

No. 14794

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

STAR-KIST FOODS, INC. (formerly The French
Sardine Company of California),
Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern
District of California, Central Division

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BENNION,

STAFFORD R. GRADY,

728 Pacific Mutual Building,

523 West Sixth Street,

Los Angeles, California,

For Appellee. [1*]

* Page numbers appearing at foot of original page of Transcript of Record.

In the United States District Court for the South-
ern District of California, Central Division

Civil Action No. 13867-WM.

THE FRENCH SARDINE COMPANY OF
CALIFORNIA, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
CORPORATION INCOME TAX, DECLARED
VALUE EXCESS PROFITS TAX, EXCESS
PROFITS TAX AND INTEREST

Plaintiff complains of the defendant, and for a
cause of action alleges:

I.

That at all times hereinafter mentioned, the de-
fendant was and now is a sovereign body politic;
that the plaintiff at all times hereinafter mentioned
was and now is a corporation, organized and exist-
ing under the laws of the State of California, with
its principal place of business in the County of Los
Angeles, State of California, within the Sixth Col-
lection District of the State of California.

II.

That on or about July 29, 1948, plaintiff paid to
the Collector of Internal Revenue for the Sixth
Collection District of California at Los Angeles,
California, the sum of One Hundred Three Thou-

sand Six Hundred Twenty-Five Dollars and Eighteen Cents (\$103,625.18), hereinafter mentioned, [2] representing alleged deficiencies in income tax, declared value excess profits tax and excess profits tax, together with interest thereon; that on the date of such payment, Harry C. Westover, was the Collector of Internal Revenue in and for the Sixth Collection District of California; that said Harry C. Westover is not in office as such Collector of Internal Revenue at the time of the commencement of this action.

III.

That no action on the claim herein referred to has been taken before the Congress, or any of the departments of the United States, or in any Court; that no assignment or transfer of said claim has been made. That plaintiff is informed and believes, and on such information and belief alleges, that it is entitled to the amount herein claimed from the defendant and that there is no just credit or offset against said claim which is known to the plaintiff.

IV.

That on or about the 15th day of August, 1943, and within the time allowed by law, plaintiff duly filed for its fiscal year ended May 31, 1943, with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth Collection District of California, a federal income and declared value excess profits tax return, Form 1120, showing an income tax of Seventy-Nine Thousand Three Hun-

dred Twenty-Four Dollars and Ten Cents (\$79,324.10), and a declared value excess profits tax of Fifty-Five Thousand Four Hundred Nineteen Dollars and Fifty-Nine Cents (\$55,419.59), and an excess profits tax return, Form 1121, showing an excess profits tax of Eight Hundred Twelve Thousand, Two Hundred Sixteen Dollars and Fifty-Three Cents (\$812,216.53), all of which taxes were duly paid within the time and in the manner required by law. That thereafter, on or about [3] January 28, 1947, as a result of an examination by agents of the Bureau of Internal Revenue, additional taxes were asserted against plaintiff and on or about July 29, 1948, plaintiff paid to Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth Collection District of California, additional corporation income tax of Ten Thousand Three Hundred Ninety-Six Dollars and Ninety-Two Cents (\$10,396.92), additional declared value excess profits tax of Twelve Thousand Seven Hundred Ten Dollars and Forty Cents (\$12,710.40), and additional excess profits tax of Fifty-Six Thousand Seven Hundred Seventy Dollars and Seventeen Cents (\$56,770.17), aggregating Seventy-Nine Thousand Eight Hundred Seventy-Seven Dollars and Forty-Nine Cents (\$79,877.49), together with interest thereon of Twenty-Three Thousand Seven Hundred Forty-Seven Dollars and Sixty-Nine Cents (\$23,747.69), or a total payment of One Hundred Three Thousand Six Hundred Twenty-Five Dollars and Eighteen Cents (\$103,625.18).

V.

That on or about October 14, 1949, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California, a claim for refund, Treasury Form 843, for a portion of the aforesaid additional corporation income tax, declared value excess profits tax and excess profits tax, and interest paid by plaintiff; which claim was in the total sum of One Hundred Ten Thousand Twenty - Seven Dollars and Ninety - Nine Cents (\$110,027.99). A copy of said claim is attached hereto, marked "Exhibit A" and made a part hereof as though the same were written at length herein. That on or about February 20, 1947, plaintiff filed for the fiscal year ending May 31, 1943, with the Internal Revenue Agent in Charge, Treasury Form 872, waiver extending the period of limitations upon [4] the assessment of income and profits tax to June 30, 1948. Subsequently a second waiver, Form 872, extending the period of limitations upon the assessment of income and profits tax to June 30, 1949, was executed and filed with the Internal Revenue Agent in Charge at Los Angeles, California, or or about March 30, 1948.

VI.

That a period of more than six (6) months has elapsed since the filing by plaintiff of the aforesaid claim for refund, and plaintiff has received no notice from the Commissioner of Internal Revenue of any action taken with respect to said claim.

VII.

That in determining the aforesaid additional tax and interest, the Commissioner of Internal Revenue, by his agents, disallowed as a deduction from income the amount of Ninety-Seven Thousand Two Hundred Fifteen Dollars (\$97,215.00) which amount was paid by plaintiff on or about May 20, 1943, to the Treasurer of the United States, representing the amount plaintiff was alleged to have charged its customers in excess of General Maximum Price Regulations promulgated by the Office of Price Administration. Plaintiff is informed and believes, and on such information and belief alleges, that the aforesaid amount is deductible under the provisions of Section 23 (a) (1) (A) of the Internal Revenue Code in determining the taxable income of its fiscal year ended May 31, 1943, for corporation income and declared value excess profits tax and excess profits tax purposes.

VIII.

That in determining the aforesaid additional tax and interest, the Commissioner of Internal Revenue, by his agents, failed to allow plaintiff its post-war refund credit [5] of ten per cent (10%) of the additional excess profits tax determined, as required by Section 780 of the Internal Revenue Code. Plaintiff is informed and believes, and upon such information and belief alleges, that of the additional excess profits tax in the amount of Fifty-Six Thousand Seven Hundred Seventy Dollars and Seven-

teen Cents (\$56,770.17) which was determined, and paid by plaintiff, ten per cent (10%) thereof, or the sum of Five Thousand Six Hundred Seventy-seven Dollars and Two Cents (\$5,677.02) was erroneously and illegally collected.

IX.

That as a result of all of the foregoing, plaintiff's corporation income tax, declared value excess profits tax and excess profits tax for its fiscal year ended May 31, 1943, has been erroneously and illegally overassessed and collected in the aggregate amount of at least Eighty-Six Thousand Two Hundred Eighty Dollars and Thirty Cents (\$86,280.30), together with interest thereon in the amount of at least Twenty - Three Thousand Seven Hundred Forty-Seven Dollars and Sixty-Nine Cents (\$23,747.69); that said sums have not been refunded to plaintiff, and the whole thereof, together with interest thereon as provided by law, is now due and owing to plaintiff.

Wherefore, plaintiff prays for judgment against the defendant in the sum of One Hundred Ten Thousand Twenty-Seven Dollars and Ninety-Nine Cents (\$110,027.99), or such larger sum as may be found to have been overpaid by plaintiff, together with interest on the sum overpaid from the respective dates of overpayment, as provided by law, and

for such other and further relief as the Court may deem just and proper in the premises. [6]

Dated February 21, 1952.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

/s/ A. CALDER MACKAY,
/s/ By ARTHUR McGREGOR,

ROLAND G. SWAFFIELD
/s/ ROLAND G. SWAFFIELD,
Attorneys for the Plaintiff. [7]

Duly Verified.

EXHIBIT "A"

Form 843, Treasury Department, Internal Revenue
Service (Revised July 1947)

CLAIM

To be filed with the Collector where assessment was
made or tax paid.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse.

[xx] Refund of Taxes Illegally, Erroneously, or
Excessively Collected.

[Stamped]: Received Oct 14 1949 Coll. Int. Rev.
Los Angeles, Cal. Teller-C.

* * * * *

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: The
French Sardine Company of California.

Exhibit "A"—(Continued)

Business address: 181 Fish Harbor Wharf, Terminal Island, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Sixth District of California.

2. Period from June 1, 1942, to May 31, 1943.

3. Character of assessment or tax: Income and Declared Value Excess Profits Tax and Excess Profits Tax.

4. Amount of assessment, \$988,092.38; dates of payment: During fiscal year ended May 31, 1944, and on or about July 29, 1948.

* * * * *

6. Amount to be refunded: \$110,027.99 plus interest thereon.

* * * * *

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on December 31, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached

The French Sardine Company of
California,

By Joseph J. Bogdonovich, President

Exhibit "A"—(Continued)

Subscribed and sworn to before me this 13th day of Oct., 1949.

(Seal) H. C. Newcomer, Notary Public.

I.

On or before the time required by law, or within a period of a legally granted extension thereafter, Claimant filed for the fiscal year ended May 31, 1943, corporation income and declared value excess profits tax return, Form 1120, showing an income tax of \$79,324.10 and declared value excess profits tax of \$55,419.59, or a total income and declared value excess profits tax of \$134,743.69; and a Form 1121, corporation excess profits tax return for the same fiscal period, showing an excess profits tax liability of \$812,216.53. All of the above taxes were paid during the fiscal year ended May 31, 1944, with the exception of \$38,745.33 of excess profits taxes deferred under Section 710 (a) (5) of the Internal Revenue Code, which amount has not been paid. No part of the above sums have been refunded to this Claimant.

II.

As a result of an examination of said returns by the Commissioner of Internal Revenue through his agent, the Internal Revenue Agent in Charge at Los Angeles, California, certain deficiencies were proposed by letter dated January 28, 1947, bearing symbols LA:30D. After protest and conference duly had proposed deficiencies with interest thereon, as

Exhibit "A"—(Continued)

indicated, were paid by Claimant on or about July 29, 1948, to the Collector of Internal Revenue for the 6th Collection District of California at Los Angeles, as follows: [9]

Corporation income tax	\$ 10,396.92
Declared value excess profits tax	12,710.40
Excess profits tax	56,770.17
	<hr/>
Total tax	79,877.49
Interest	23,747.69
	<hr/>
Total payment	\$103,625.18

No part of said total amount of \$103,625.18 has been refunded to this Claimant.

That both the Commissioner of Internal Revenue and the Claimant have consented in writing to an extension of time to June 30, 1949, within which income and excess profits taxes may be assessed for the year here involved.

III.

Said proposed deficiency was based in substantial measure upon the examining agent's erroneous action in disallowing as a deduction from income the amount of \$97,215.00 paid by Claimant to the Treasurer of the United States on or about May 20, 1943. The facts surrounding the said payment are as follows:

On or about April 28, 1942, the Office of Price Administration promulgated General Maximum Price Regulations which stabilized or froze all

Exhibit "A"—(Continued)

canned fish prices at the level of the highest prices at which each individual canner sold his products during the month of March, 1942. These regulations caused much confusion in the canned fish industry with variations in price on similar items as great as \$6.00 per case basis 48/1½'s. Fancy tuna could be sold at the time for almost any price which might be asked for it. [10]

Claimant believes and therefore alleges that Claimant's ceiling on fancy tuna was the lowest in the industry, namely \$11.00 per case, while other canners sold at prices as high as \$17.00 per case of 48/1½'s. There was no ceiling on raw fish and, as a result, some of the canners bid up the price of the raw product from a low of \$120.00 per ton to as much as \$250.00 per ton.

The Claimant in order to avoid transfers of its contracted boats to the high bidders, was forced to meet these prices. Mr. A. T. Williams, then Vice-President and Sales Manager of Claimant, constantly pressed the Office of Price Administration by telephone, telegraph, letters and personal trips to Washington for relief and clarification of the situation.

Relief in the form of a uniform ceiling for the industry did not come until January, 1943, but in the meantime the Head of the Fish Section, Food and Food Products Branch, of the Office of Price Administration in Washington, gave oral consent to an increase in price on canned tuna for Claimant of \$1.00 per case, and assured Mr. Williams that

Exhibit "A"—(Continued)

any complaints regarding the higher price would go over his desk and that he would take proper action to see that claimant was protected.

Claimant agreed in return that it would type the following notice on all invoices carrying the new price until such time as formal ceilings were declared:

"Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, [11] we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½'s and \$2.00 per case on 48/1's, and will refund you accordingly.

French Sardine Co., Inc."

This was done on all invoices from approximately September 15, 1942, to about the middle of January, 1943, at which time formal ceilings were announced and these ceilings were exactly the same as the new prices charged by Claimant, that is, \$11.00 per case. The Office of Price Administration was advised of the proposed action in writing prior to the time when the change was made.

In April, 1943, investigators from the Los Angeles Office of Price Administration enforcement division checked records of sales which Claimant had made on the higher basis, and notwithstanding and under the protest of Claimant refused to approve the increase. Claimant offered to make the refund to its customers in accordance with the

Exhibit "A"—(Continued)

above notice, but this was objected to by the OPA enforcement officials.

Instead, the Office of Price Administration Officials insisted that the admitted liability to Claimant's customers be paid to the United States Government. They agreed that there had been no violation of the spirit, intent or purpose of the price regulations, but that by reason of a "technical violation", liability in the amount of \$1.00 per case arose to either the Government or the customer, and they insisted Claimant should make the payment directly to the Government as a "contribution to the war effort." Claimant was assured that the same was not [12] being extracted as a fine or penalty. Claimant sold on the above basis 97,215 cases. Accordingly, a check in the amount of \$97,215.00 was made out to The Treasurer of the United States and forwarded to the Los Angeles Office of Price Administration offices on May 20, 1943.

IV.

That the Commissioner through his examining agent in determining the proposed deficiency set forth in paragraph II hereof further erroneously failed to allow Claimant its post war refund credit of ten per cent of the additional excess profits tax determined as provided by Section 780 of the Internal Revenue Code. The amount of said additional excess profits is \$56,770.17, and the post war refund credit to which Claimant is entitled by reason of

Exhibit "A"—(Continued)

said erroneous action is the amount of \$5,677.02, all of which is refundable to this Claimant.

V.

As a result of the aforesaid erroneous action by the Commissioner through his examining agent, Claimant's tax for the fiscal year ended May 31, 1943, has been overpaid in the amount of \$86,280.30 and interest thereon in the amount of \$23,747.69 has been erroneously paid and collected. Computation of said overpayment is set forth in Schedule A, attached hereto and made a part hereof. The total amount of \$110,027.99 is, therefore, due and owing to Claimant and Claimant hereby respectfully demands that the said amount be refunded to it together with interest thereon as provided by law.

VI.

Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of its said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department (d) any re-

Exhibit "A"—(Continued)

pealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

This is to certify that the undersigned prepared the foregoing claim for refund and that the statement of facts therein set forth is from information furnished by the taxpayer, which the undersigned believe to be true.

ARTHUR MCGREGOR,
F. EDWARD LITTLE,

Attorneys for Taxpayer, 728 Pacific Mutual Building, 523 West Sixth Street, Los Angeles 14, California. Michigan 5175.

ROLAND G. SWAFFIELD,
Of Counsel. 902 Farmers & Merchants Bank Building, Long Beach 12, California. [14]

FRENCH SARDINE COMPANY OF CALIFORNIA
FISCAL YEAR ENDED 5-31-43

Recomputation of Taxes, Showing Overpayment by Reason of Failure of Revenue Agent to Allow Deduction From Income of \$97,215.00 Paid O.P.A.

Declared Value Excess Profits Tax	
Net Income Revised, per Conferee.....	\$ 1,266,136.28
Less O.P.A. Adjustment	97,215.00
	<hr/>
Less Credit 10% of \$6,000,000	600,000.00
	<hr/>
	568,921.28
	<hr/> <hr/>

Exhibit "A"—(Continued)

Tax on \$300,000.00 at 6.6%.....	19,800.00
Tax on \$268,921.28 at 13.2%.....	35,497.61
Revised Tax	55,297.61
Tax Paid	68,129.99
Tax Overpaid	12,832.38
<hr/>	
Normal and Surtax	
Net Income Revised, per Conferee.....	1,266,136.28
Less O.P.A. Adjustment..... 97,215.00	
Declared Value Excess Profits Tax.... 55,297.61	
Capital Gain	19,819.68
Income Subject to Excess Profits Tax 881,888.75	1,054,221.04
	211,915.24
<hr/>	
Normal and Surtax at 40%.....	84,766.10
Capital Gain Tax at 25%.....	4,954.92
Revised Tax	89,721.02
Tax paid	89,721.02
Deficiency	None
<hr/>	
Excess Profits Tax	
Net Income Revised, per Conferee.....	\$ 1,178,186.61
Less O.P.A. Adjustment.....	97,215.00
	1,080,971.61
Add—Reduction in Declared Value Excess Profits Tax	12,832.38
	1,093,803.99
Less Specific Exemption and Credit.....	211,915.24
Adjustment—Excess Profits Net Income.....	881,888.75
Tax at 90%.....	793,699.88
<hr/>	

Exhibit "A"—(Continued)

Surtax Net Income	1,113,623.67	
80% Thereof	890,898.94	
Less Income Tax	89,721.02	801,177.92
Lower of the two.....		793,699.88
Less Deferment—Section 710(a) (5)		38,759.51
Excess Profits Tax		754,940.37
Previously Paid		830,241.37
Tax Overpaid		75,301.00
Post War Refund of Excess Profits Tax		
Excess Profits Tax		754,940.37
Credit Allowable		75,494.04
Shown on Return		77,347.12
Reduction of Credit		1,853.08

FRENCH SARDINE COMPANY OF CALIFORNIA

FISCAL YEAR ENDED 5-31-43

STATEMENT OF DEFERMENT UNDER SECTION 710(a) (5)

Excess Profits Net Income Revised.....	\$ 1,093,803.99	
Less Specific Exemption	5,000.00	
Credit per Claim.....	337,418.64	342,418.64
90% Thereof		751,385.35
		676,246.82
Surtax Net Income	1,113,623.67	
80% Thereof	890,898.94	
Less Income Tax.....	133,994.50	756,904.44
Tax Applicable		676,246.82

Exhibit "A"—(Continued)

Deferment

Excess Profits Tax Without Regard to Section 722....	793,699.88
Excess Profits Tax After Application of Section 722.....	676,246.82
<hr/>	
Reduction in Tax.....	117,453.06
Deferment at 33%	38,759.51
<hr/> <hr/>	
Recapitulation of Tax Overpaid	
Overpayment Declared Value Excess Profits Tax.....	12,832.38
Overpayment Excess Profits Tax.....	75,301.00
Less Reduction in Post War Credit....	1,853.08
	73,447.92
<hr/>	
Subject to Refund.....	86,280.30

[Endorsed]: Filed February 27, 1952.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon (1) A. Calder MacKay and Arthur McGregor, of MacKay, McGregor, Reynolds & Bennion, and (2) Roland G. Swaffield, plaintiff's attorneys, whose addresses are (1) 728 Pacific Mutual Building, 523 West Sixth Street, Los Angeles 14, California, and (2) 902 F. & M. Office Building, 320 Pine Avenue, Long Beach 12, California, an answer to the complaint which is herewith served upon you, within sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail to

do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: February 27, 1952.

[Seal] EDMUND L. SMITH,
Clerk of Court
/s/ By L. CUNLIFFE,
Deputy Clerk [18]

Return on Service of Writ attached. [19]

[Endorsed]: Filed February 29, 1952.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof, except that it is denied that the deficiencies were merely "alleged" deficiencies.

III.

Answering paragraph III of the complaint, defendant denies that plaintiff is entitled to the amount claimed from the defendant, and alleges

that defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph III.

IV.

Admits the allegations contained in paragraph IV thereof, except that it is alleged that the amount of the excess profits tax shown on the return and paid was \$773,471.20, rather than \$812,216.53. [20]

V.

Admits the allegations contained in paragraph V thereof, except that the allegations in the claim for refund are denied, except to the extent that similar allegations in the complaint are admitted in this answer.

VI.

Admits the allegations contained in paragraph VI thereof.

VII.

Admits the allegations contained in paragraph VII thereof, except that it is denied that the payment of \$97,215.00 is deductible in determining plaintiff's taxable income for its fiscal year ended May 31, 1943, for federal tax purposes.

VIII.

Denies the allegations contained in paragraph VIII thereof.

IX.

Denies the allegations contained in paragraph IX thereof, except that it is admitted that the sums mentioned have not been refunded.

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

WALTER S. BINNS,
United States Attorney

E. H. MITCHELL and
EDWARD R. McHALE,
Asst. U.S. Attorneys

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue

/s/ E. H. MITCHELL,
Attorneys for Defendant [21]

Affidavit of Service by Mail attached. [22]

[Endorsed]: Filed Oct. 24, 1952.

[Title of District Court and Cause.]

PRETRIAL STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent

herewith, and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to, as follows:

I.

Plaintiff was incorporated under and by virtue of the laws of the State of California on November 20, 1917.

II.

Plaintiff filed a timely corporation income and declared value excess profits tax return (Form 1120) and a timely excess profits tax return (Form 1121) for the taxable year ended May 31, 1943, the taxable year involved in this proceeding, with the Collector of Internal Revenue for the Sixth District of California. [23]

III.

Plaintiff keeps its books and files its tax returns on the basis of the accrual method of accounting and on the basis of fiscal years ending May 31.

IV.

Plaintiff at all times here pertinent has been engaged in the fish cannery business and has maintained its offices and principal place of business at 181 Fish Harbor Wharf, Terminal Island, Los Angeles, California, within the jurisdiction of this Court.

V.

By its check No. 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States \$97,-

215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of certain of its products (canned tuna), i.e., single damages, in settlement of claims made against plaintiff by the Office of Price Administration.

VI.

On its tax returns (referred to in paragraph II above) for the taxable year ended May 31, 1943, plaintiff deducted the amount of \$97,215.00 as an ordinary and necessary business expense.

VII.

On January 28, 1947, as a result of an examination by agents of the Bureau of Internal Revenue, and in substantial part because of the disallowance of the amount of \$97,215.00 as a deduction, additional taxes were asserted against plaintiff.

* * * * * [24]

IX.

On October 14, 1949, plaintiff filed with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth District of California, a timely Claim for Refund (Form 843) in the form and manner as required by law, claiming a refund due plaintiff in the amount of \$110,027.99, plus interest thereon as provided by law, in large part as a result of the disallowance of said \$97,215.00 as a deduction.

X.

Said Harry C. Westover resigned as Collector of Internal Revenue for the Sixth District of Califor-

nia, effective October 31, 1949, and was not in said office at the time this action was commenced.

XI.

A period of more than six months had elapsed since the filing of said Claim for Refund, on October 14, 1949, when the instant action was commenced by the filing of the complaint herein on February 27, 1952, and plaintiff had not then, and has not yet received any notice from the Commissioner of Internal Revenue that any action has been taken with respect to said Claim for Refund.

Schedule of Exhibits

It is hereby stipulated that the following documents are authentic and may be received in evidence without any foundation being laid and without prejudice to the rights of any party herein to object to their relevancy, materiality or competency:

1. Photostatic copy of "Complaint" in Civil Action No. 2960-BH entitled Prentiss M. Brown et al. vs. French Sardine Company, filed in this court on June 3, 1943.

2. Photostatic copy of "Stipulation" in Civil Action No. 2960-BH also filed on June 3, 1943.

3. Photostatic copy of "Judgment" in Civil Action No. 2960-BH also filed on June 3, 1943.

4. Photostatic copy of Maximum Price Regulation number 299, issued by Leon Henderson, Administrator of the Office of Price Administration, on January 7, 1943.

5. Telegram from French Sardine Company,

Inc., to Charles M. Elkington dated July 29, 1942.

6. Telegram to Charles M. Elkington from French Sardine Company, Inc., dated August 10, 1942.

7. Letter from the French Sardine Company, Inc., by A. T. Williams, to the Office of Price Administration, Los Angeles, California, dated September 2, 1942.

8. Letter to Charles W. Triggs from French Sardine Company, Inc., by Mr. Williams, dated September 24, 1942.

9. Letter from the French Sardine Company, Inc., by A. T. Williams, to Charles W. Triggs, dated November 6, 1942.

10. Letter from the French Sardine Company, Inc., by A. T. Williams, to Office of Price Administration, Los Angeles, California, dated November 16, 1942.

11. Letter from the French Sardine Company, Inc., by A. T. Williams, to Charles W. Triggs, dated November 16, 1942. [26]

12. Letter from French Sardine Company by A. T. Williams to Chas. W. Triggs, dated December 5, 1942.

13. Letter from French Sardine Company by A. T. Williams to office of Price Administration, Los Angeles, dated December 5, 1942.

14. Letter from French Sardine Company, Inc., by Mr. Williams to Charles W. Triggs dated April 29, 1943.

15. Letter from Charles W. Triggs to A. T. Williams dated May 6, 1943.

16. Letter from French Sardine Company, Inc., by Mr. Williams, to Charles W. Triggs dated May 6, 1943.

17. Letter from Charles W. Triggs to A. T. Williams dated May 19, 1943.

18. Letter from Charles W. Triggs to A. T. Williams dated July 7, 1943.

Dated: November 22, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant

MACKAY, McGREGOR,
REYNOLDS & BENNION

/s/ By ARTHUR McGREGOR,
Attorneys for Plaintiff

[27]

[Endorsed]: Filed Nov. 23, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL PRETRIAL STIPULATION OF FACTS

This supplemental pre-trial stipulation of facts will supplement that heretofore entered into by the

parties, dated November 22, 1954, and filed with the Court on November 23, 1954.

It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith, and without prejudice to their right to object to materiality or relevancy of any of the facts agreed to as follows:

I.

Attached hereto and marked Exhibit No. 1 is schedule showing the amounts of income, declared value excess profits tax and excess profits tax, and interest, which plaintiff has paid to the Collector of Internal Revenue for the 6th District of California for the fiscal year ended May 31, 1943, together with the dates of payment and the post war refunds and adjustments. [28]

II.

On the 24th day of April, 1953, at a regular meeting of the Board of Directors of The French Sardine Company of California, the name of plaintiff corporation was changed to Star-Kist Foods, Inc., by resolution approved by the shareholders of plaintiff corporation.

Schedule of Exhibits

It is hereby stipulated that the following documents are authentic and may be received in evidence without any foundation being laid and with-

out prejudice to the rights of any party herein to object to their relevancy, materiality or competency. The documents listed follow in numerical order those listed in the Schedule of Exhibits previously filed herein on November 23, 1954:

Photostatic copy of the following Price Regulations:

19. General Maximum Price Regulation issued April 28, 1942.

20. Maximum Price Regulation 237, issued October 10, 1942.

21. Maximum Price Regulation 184, issued July 23, 1942.

22. Maximum Price Regulation 209, effective August 31, 1942.

23. Maximum Price Regulation 247, issued October 24, 1942.

24. Maximum Price Regulation 252, issued October 30, 1942.

25. Maximum Price Regulation 265, issued November 9, 1942.

26. Maximum Price Regulation 277, issued November 28, 1942.

27. Maximum Price Regulation 366, issued April 13, 1943.

28. Copy of United States Corporation Income and Declared Value Excess Profits Tax Return (Form 1120) filed by plaintiff for the fiscal year ending May 31, 1943.

29. Copy of United States Corporation Excess Profits Tax Return (Form 1121) filed by plaintiff for the fiscal year ending May 31, 1943.

30. Copy of Claim for Refund (form 843) filed by [29] plaintiff on October 14, 1949.

Dated: January 5, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant

MACKAY, McGREGOR,
REYNOLDS & BENNION

/s/ By STAFFORD R. GRADY,
Attorneys for Plaintiff

[30]

[Endorsed]: Filed January 6, 1955.

French Sardine Company

Schedule of Income, Discharged Value, Excess Profits and Excess Profits
Taxes Paid and Post War Refunds and Adjustments for Taxation
Ending May 31, 1943

Date	Income Tax	Discharged Value Excess Profits	Excess Profits Tax	Total Tax	Interest	Total Tax and Interest
<u>Payments</u>						
August 12 1943	*1983103	*1385490	*19336780	*22705373	*	*22705373
Nov. 15, 1943	1983103	1385490	19336780	22705373		22705373
Feb. 8, 1944	1983103	1385490	19336780	22705373		22705373
May 9, 1944	1983103	1385489	19336780	22705372		22705372
July 28, 1948	1039692	1271040	5677017	7987749	2286961	10274710
Oct. 19, 1951			3844264	3844264	1750720	5594984
Total Paid	*8972104	*6812999	*86868401	*102653504	*4037681	*106691185

Post War Credit Refunds and Adjustments

Dec. 2, 1946			(7734712)	(7734712)		(7734712)
Nov. 14, 1949			(567702)	(567702)	(88165)	(655867)
Oct. 19, 1951			(384426)	(384426)		(384426)
Total	*8972104	*6812999	*78131561	*93766664	3949516	*97716180

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Jan. 7, 1955, at Los Angeles, Calif.

Present: Hon. Leon R. Yankwich, District Judge;
Deputy Clerk: John A. Childress; Reporter: Don
P. Cram; Counsel for Plaintiff: A. Calder MacKay,
Arthur McGregor, Stafford R. Grady; Counsel for
Defendant: Robert H. Wyshak, Asst. U.S. Atty.

Proceedings: For further trial.

John V. Morris and John P. Tripps, respectively,
are called, sworn, and testify for plaintiff.

Portions of deposition of Charles W. Triggs,
taken on behalf of defendant Aug. 5, 1954, are read
into evidence.

Plf's Ex. 1 to 36 incl. are admitted in evidence.

Plaintiff rests.

Portion of Deposition of Charles W. Triggs,
taken on behalf of plaintiff Aug. 5, 1954, is read
into evidence on behalf of defendant.

Defendant rests.

Attorneys MacKay and Wyshak argue to the
Court.

The Court makes a statement and finds in favor
of plaintiff.

It is ordered that judgment be in favor of plain-
tiff; amount to be computed under Rule 7.

EDMUND L. SMITH,

Clerk

[32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on for trial on the 6th and 7th days of January, 1955, before the Court, the Honorable Leon R. Yankwich sitting without a Jury; plaintiff having been represented by its counsel, Mackay, McGregory, Reynolds & Bennion, through A. Calder Mackay, Arthur McGregor and Stafford R. Grady, and the defendant having been represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Robert H. Wyshak, Assistant United States Attorney; and after having considered the pleadings, the stipulations, the oral and documentary evidence adduced, the memoranda and the oral arguments of counsel for the respective parties, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff was incorporated under and by virtue of the laws of the State of California, on November 20, 1917, as The French [33] Sardine Company of California. On April 24, 1953, the name of plaintiff corporation was changed to Star-Kist Foods, Inc. At all times since its incorporation, plaintiff has been engaged in the fish cannery business, its principal products being canned sardines, mackerel and

tuna. Plaintiff purchases raw fish by the ton from fishermen, cans the fish and sells it to customers (who then resell it to consumers) through brokers. Plaintiff maintains its offices and principal place of business at 181 Fish Harbor Wharf, Terminal Island, Los Angeles, California, within the jurisdiction of this Court.

II.

Plaintiff keeps its books and files its tax returns on the basis of the accrual method of accounting, and on the basis of fiscal years ending May 31. Plaintiff filed a timely corporation income and declared value excess profits tax return (Form 1120), and a timely excess profits tax return, for the fiscal year ended May 31, 1943, the taxable year involved in this proceeding, with the Collector of Internal Revenue for the Sixth District of California, and paid the taxes shown due thereon. The Schedule of Income, Declared Value Excess Profits and Excess Profits Taxes Paid and Post War Refunds and Adjustments for the taxable year ended May 31, 1943, (Exhibit No. 1 attached to Supplemental Pre-Trial Stipulation of Facts) is incorporated herein by this reference.

III.

By its check number 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States, \$97,215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of certain of its products (canned tuna), i.e., single

damages, in settlement of claims made against plaintiff by the Office of Price Administration. [34]

IV.

On its tax returns (referred to in paragraph II above for the taxable year ending May 31, 1943) plaintiff deducted the amount of \$97,215.00 as an ordinary and necessary business expense. The Commissioner of Internal Revenue disallowed the amount of \$97,215.00 as a deduction; additional taxes were asserted against and paid by plaintiff.

V.

On October 14, 1949, plaintiff filed with Harry C. Westover, who was then the Collector of Internal Revenue for the Sixth District of California, a timely claim for refund (Form 843) in the form and manner as required by law, claiming a refund of taxes alleged therein to have been overpaid (plus interest thereon as provided by law) in large part as a result of the disallowance of said \$97,215.00 as a deduction. A period of more than six months had elapsed since the filing of said claim for refund, when the instant action was commenced by the filing of the complaint herein on February 27, 1952; plaintiff had not then received any notice from the Commissioner of Internal Revenue that any action had been taken with respect to said claim for refund; and said Westover was no longer in office.

VI.

The payment of \$97,215.00, referred to in paragraph III above, to the Treasurer of the United

States, grew out of the following circumstances: The Emergency Price Control Act of 1942 was approved on January 30, 1942, and pursuant thereto, the Administrator of the Office of Price Administration (frequently hereinafter referred to as OPA) issued the General Maximum Price Regulation (frequently hereinafter referred to as GMPR). This regulation fixed the price at which the plaintiff could sell its products at the same price at which it had sold them during the month of March, 1942.

VII.

Plaintiff had not sold fancy light meat tuna during March, 1942, and it was, therefore, required, under the terms of GMPR, to adopt as its ceiling price for that commodity, the price which was charged during March, 1942, by its nearest competitor. There was some dispute and confusion among plaintiff's officials as to who was plaintiff's nearest competitor. A. T. Williams, plaintiff's sales manager, chose Van Camp Sea Food Company, out of an abundance of caution; because Van Camp had the lowest price in the industry, i.e., \$11.00 per case on fancy light meat tuna, basis 48/1½'s. Plaintiff's legal counsel, John Morris, Esq., was consulted about the choice of Van Camp as plaintiff's nearest competitor, and he advised that other canners were more closely comparable with plaintiff than was Van Camp, and that the ceilings of these other canners, which ceilings were higher than Van Camp's, should be taken as plaintiff's ceilings. Notwithstanding this advice, plaintiff accepted the lowest

ceiling price in the industry as its own. Other canners had ceiling prices on this same product several dollars higher. For instance, High Seas Tuna Company, of San Diego, which was controlled by the same individual (Martin J. Bogdanovich) who controlled plaintiff, had a ceiling price of \$14.00 per case on fancy light meat tuna, basis 48/1½'s.

VIII.

No ceilings were fixed upon the price of raw fish by GMPR. As a result, prices which canners had to pay for their raw material—fresh fish—rose rapidly. This was true in many kinds of fish, including tuna. For instance, by the end of 1941, yellowfin (tuna) was bringing \$130.00 per ton. Early in 1942, the price jumped to \$160.00 and by the end of the season the price had advanced to \$190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of \$200.00 per ton. [36] This situation was recognized and reflected in the Statement of Considerations issued by the Administrator of OPA when the price of fresh tuna fish was finally fixed by Regulation No. 366 issued on April 13, 1943.

IX.

Plaintiff was caught in an economic bind. It was required to sell its canned fancy light meat tuna for \$11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish.

X.

This situation, i.e., the widely varying ceiling prices which various canners had upon the same product under GMPR, together with the fact that the price of raw fish was not fixed, and constantly rising, was recognized in the summer of 1942 as an inequitable one by the officials of the OPA, including Charles W. Triggs, who was then the head of the Fish Section of the Office of Price Administration in Washington. Triggs proposed to remedy this situation by issuing a regulation fixing, at a definite dollar and cents figure, the price at which all canners would be required to sell the same product, and also by fixing the price which fishermen could charge for the raw fish.

XI.

For the purpose of obtaining some relief from this inequitable situation, plaintiff's sales manager, Williams, was in constant touch with OPA officials in Washington during the Summer and Fall of 1942. He made several trips to Washington to confer with Triggs concerning the matter; he spoke with Triggs frequently over the long distance telephone; and he wrote Triggs. Triggs was of the firm belief that plaintiff was in a bad position and advised Williams that a new regulation, which would give plaintiff relief, could be expected momentarily; and gave Williams reason [37] to believe that the expected new dollar and cents ceiling price for fancy light meat tuna would be \$12.00 per case, basis 48/1½'s.

XII.

New dollar and cents ceiling prices were fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

Regulation No.	Date	Product
184	July 23, 1942	Maine Sardines
209	Aug. 31, 1942	California Sardines
247	Oct. 24, 1942	Domestic Canned Crab Meat
252	Oct. 30, 1942	Vinegar Cured Herring
265	Nov. 9, 1942	Salmon
277	Nov. 28, 1942	Mackerel

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which plaintiff was entitled to sell its sardines at figures which averaged 20.9% higher than the ceiling price which plaintiff had had under GMPR.

XIII.

While awaiting the new anticipated dollar and cents ceiling on canned tuna, plaintiff accumulated a rather large inventory with a value of over a half million dollars. During the last week in August and the first three weeks of September, 1942, plaintiff shipped about 40 carloads of canned tuna without invoicing it. Toward the end of September, plaintiff's cash position became relatively low. Whereas plaintiff's cash expenditures averaged approximately \$235,000.00 per week during the sardine season months of October through December, 1942, plaintiff had on hand cash in the amount of

\$144,919.07 as of September 24, 1942; i.e., less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [38]

XIV.

Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, plaintiff would not be taking any chances by raising its price; that he (Triggs) would support anything plaintiff might do within reason. Plaintiff's legal counsel, John Morris, was consulted concerning what steps plaintiff might take. He advised that tuna might be both canned and sold through the High Seas Tuna Packing Company in San Diego at a \$14.00 per case ceiling, since both plaintiff and High Seas were controlled by the same individual, Martin J. Bogdanovich. However, Mr. Bogdanovich decided against this course, because he did not want to profiteer because of the war. Morris also considered the following matters: The admittedly inequitable situation in which plaintiff found itself with the lowest ceiling in the industry under GMPR; the possibility that plaintiff's ceiling was really not \$11.00 a case on fancy light meat tuna because of his opinion that Van Camp was not plaintiff's nearest competitor; the pronouncements from government officials in Washington, and particularly one by Secretary Wicard that inequities under GMPR would be corrected as rapidly as possible, but that

nothing in it should retard production; and the assurances from Triggs; and, based upon these considerations and others, Morris advised plaintiff that in his opinion it would be proper to invoice plaintiff's customers, at \$12.00 per case of fancy light meat tuna, basis 48/1/2's, and place the following notation upon the invoice:

"Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1/2's [39] and \$2.00 per case less on 48/1's, and will refund you accordingly."

XV.

In accordance with this advice plaintiff, on and after September 24, 1942, invoiced its customers with the notation indicated above. Plaintiff also sent a mimeographed announcement to all of its customers on September 24, 1942, explaining its action. On the same day plaintiff by letter advised Triggs of the action taken.

XVI.

Due to delays in the Washington office of OPA, the expected regulation fixing a dollar and cents price on canned tuna was not issued until January 7, 1943. On that date, by Regulation No. 299, the OPA fixed the ceiling price on fancy light meat tuna at \$12.00 per case, basis 48/1/2's, i.e., at exactly the price at which plaintiff had invoiced its customers.

XVII.

Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of plaintiff's sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that plaintiff had overcharged its customers \$97,215.00 on sales of canned tuna. Conferences were had between officials of plaintiff and enforcement officials of the Los Angeles office of the OPA. Plaintiff's representatives were told that they had violated GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if plaintiff would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort. Plaintiff thereupon made the payment, dated May 20, 1943, in the amount of \$97,215.00 to the Treasurer of [40] the United States. Plaintiff's officers also signed a waiver of answer and consent judgment in an action to restrain future violations, which action was thereafter, on June 3, 1943, filed by the OPA, in this Court against plaintiff.

XVIII.

The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing plaintiff for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of

the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between plaintiff and Triggs, and a conference with Triggs in Washington. Single damages were accepted because it was considered that plaintiff's violation was inadvertent and not willful; that plaintiff had acted in good faith and had taken reasonable precautions to comply with the law.

XIX.

The payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was made in circumstances which are inconsistent with an intention to violate the Emergency Price Control Act of 1942 and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations; plaintiff acted in good faith and took reasonable precautions to avoid violating the law and regulations; the payment was a method of preventing unjust enrichment by plaintiff as a result of the overcharge, and it did not constitute a penalty; and allowance of said payment as a deduction would not frustrate enforcement of the applicable law or regulations and would not violate public policy. Plaintiff is entitled to deduct the amount of \$97,215.00 as an ordinary and necessary business expense for the fiscal year ended May 31, 1943. [41]

XX.

As a result of the Commissioner of Internal Revenue's erroneous and illegal action in disallowing

the said amount of \$97,215.00 as a deduction, plaintiff has made overpayments of declared value excess profits tax and excess profits tax and interest thereon for the taxable year ended May 31, 1943, and is entitled to a refund of said amounts plus interest thereon as provided by law.

Conclusions of Law

I.

The Court has jurisdiction of this action and of the parties hereto.

II.

The amount of \$97,215.00 paid by plaintiff to the Treasurer of the United States on May 20, 1943, constitutes an ordinary and necessary business expense incurred in its trade or business, within the purview of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939, and plaintiff is entitled to a deduction in that amount in computing its income, declared value excess profits tax and excess profits tax for the fiscal year ended May 31, 1943.

III.

Plaintiff filed a timely and valid claim for refund of taxes and interest overpaid as a result of the Commissioner of Internal Revenue's disallowance of the amount of \$97,215.00 as a deduction, and said claim for refund not having been acted upon within six months thereafter, the instant action, based upon the facts and grounds set forth in said claim for refund, was duly commenced within the period allowed by law. [42]

IV.

The name of plaintiff corporation was duly changed from The French Sardine Company of California to Star-Kist Foods, Inc. on April 24, 1953.

V.

Plaintiff, Star-Kist Foods, Inc., is entitled to a judgment against the United States of America, for a refund of declared value excess profits tax and excess profits tax and interest overpaid by it for the fiscal year ended May 31, 1943, as follows:

Declared Value Excess Profits Tax

Overpayment of tax—July 29, 1948	\$12,710.40
Overassessment not allowed—July 29, 1948	121.98
	<hr/>
	12,832.38
Overpayment of interest	3,639.01
	<hr/>
	\$16,471.39
Refund: \$16,471.39 plus interest on \$16,349.41 from July 29, 1948, and interest on \$121.98 from May 15, 1944.	

Excess Profits Tax:

Overpayment of tax—October 19, 1951	\$34,598.38
Overpayment of Interest—Jan. 31, 1952	17,507.20
	<hr/>
	\$52,105.58
Overpayment of Tax—July 29, 1948	\$32,887.34
Overpayment of Interest—July 29, 1948	9,894.71
	<hr/>
	\$42,782.05

Refund: \$42,782.05 plus interest thereon from July 29, 1948; and \$52,105.58 plus interest on \$34,598.38 from October 19, 1951, and interest on \$17,507.20 from January 31, 1952. [43]

Interest shall be at the rate of six per cent per annum and shall run from the date indicated until a date preceding the issuance of the refund check by not more than thirty days.

Dated this 3rd day of February, 1955.

/s/ LEON R. YANKWICH,

United States District Judge [44]

[Endorsed]: Lodged Jan. 21, 1955.

[Endorsed]: Filed Feb. 3, 1955.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PROPOSED FINDINGS OF FACT

Defendant objects to certain of the plaintiff's proposed findings of fact as follows:

I.

Proposed Finding of Fact No. III is as follows:

"By its check number 16577, dated May 20, 1943, plaintiff paid to the Treasurer of the United States, \$97,215.00, representing the exact amount of certain alleged overcharges on the sale by plaintiff of

certain of its products (canned tuna), i.e., single damages, in settlement of claims made against plaintiff by the Office of Price Administration."

This proposed finding speaks of "certain alleged overcharges." It is submitted that there is no question but that there was an overcharge and that subsequent findings so indicate [46] and are consistent with this objection.

II.

Proposed Finding of Fact No. IX is as follows:

"Plaintiff was caught in an economic bind. It was required to sell its canned fancy light meat tuna for \$11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish."

The plaintiff was not required to either buy or sell tuna under GMPR or any other regulation. There was no testimony that there was any compulsion on the plaintiff to do so. This finding should, therefore, be omitted.

III.

The first sentence of proposed Finding of Fact No. XIV is as follows:

"Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, plaintiff would not be taking any chances by raising its price; that he (Triggs)

would support anything plaintiff might do within reason.”

It is submitted that Triggs’ testimony as set forth in the deposition taken on behalf of the defendant does not support this statement. At page 7 of said deposition, in answer to the question: “Did you make a commitment to them?” Answer: “Well, I might have made the statement that I would support anything that they might do if it was within reason. That would be logical for me to do. Inasmuch as we were allowing increased [47] prices on other canned fish, I might possibly have made the statement they wouldn’t be taking any chances or something of that kind.” As can be seen, Mr. Triggs was merely stating what he might have said and not what his memory told him he had said. Thus, there is nothing in his testimony to support this finding.

IV.

The first three sentences of proposed Finding of Fact No. XVII are as follows:

“Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of plaintiff’s sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that plaintiff had overcharged its customers \$97,215.00 on sales of canned tuna. Conferences were had between officials of plaintiff and enforcement officials of the Los Angeles Office of the OPA. Plaintiff’s representatives were told that they had violated

GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if plaintiff would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort."

Those representatives of the Los Angeles Enforcement Office of the OPA who conferred with the plaintiff did not testify on behalf of either party. There is no evidence whatsoever to substantiate the finding that the OPA representatives had told the plaintiff's representatives "that they had violated GMPR, although they did not violate the intent or purpose of the Act;" [48] This sentence should, therefore, be stricken.

V.

Proposed Finding of Fact No. XVIII is as follows:

"The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing plaintiff for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between plaintiff and Triggs, and a conference with Triggs

in Washington. Single damages were accepted because it was considered that plaintiff's violation was inadvertent and not willful; that plaintiff had acted in good faith and had taken reasonable precautions to comply with the law."

The evidence does not substantiate the finding that "plaintiff's violation was inadvertent and not willful;" since the evidence is clear that the plaintiff's officials had accepted a \$11.00 ceiling and knew that they were selling for an amount in excess of this ceiling. The violation resulted from intentional rather than inadvertent acts.

VI.

The basis for the objection set forth in paragraph V is also applicable to the first sentence of proposed Finding of Fact No. XIX, which provides as follows:

"The payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was made in circumstances which are inconsistent with an intention to violate the Emergency Price Control Act of 1942 [49] and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations;"

The plaintiff's officers did what they did intentionally and their actions constituted a violation of the Act.

Dated: February 2, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant [50]

Affidavit of Service by Mail attached. [51]

[Endorsed]: Filed Feb. 2, 1955.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 13867-Y

STAR-KIST FOODS, INC., (formerly THE
FRENCH SARDINE COMPANY OF CALI-
FORNIA) Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause came on for hearing on January 6 and 7, 1955, before the Honorable Leon R. Yankwich, District Judge, presiding, without the intervention of a Jury. Plaintiff was represented by its counsel, Mackay, McGregor, Reynolds & Bennion, through A. Calder Mackay, Arthur McGregor and Stafford

R. Grady, and defendant was represented by its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Robert H. Wyshak, Assistant United States Attorney. The Court having made and filed its Findings of Fact and Conclusions of Law,

It is hereby ordered, adjudged and decreed that the plaintiff, Star-Kist Foods, Inc., have and recover against the defendant, the United States of America, the following amounts:

(1) \$59,253.44 plus interest on \$59,131.46 from July 29, 1948 and interest on \$121.98 from May 15, 1944. [52]

(2) \$52,105.58 plus interest on \$34,598.38 from October 19, 1951 and interest on \$17,507.20 from January 31, 1952.

Interest shall be at the rate of six per cent per annum and shall run from the date indicated until a date preceding the issuance of the refund check by not more than thirty days.

Each party shall bear its own costs.

Dated this 3rd day of February, 1955.

/s/ LEON R. YANKWICH,
United States District Judge [53]

Acknowledgment of Service attached. [54]

[Endorsed]: Lodged Jan. 21, 1955.

[Endorsed]: Judgment entered and filed Feb. 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff above named and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 523
West Sixth Street, Los Angeles 14, California:

You and each of you, are hereby advised that the defendant, United States of America, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment in favor of plaintiff dated and entered January 7, 1955, in the above entitled case.

Dated: This 8th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant,
United States of America [55]

Affidavit of Service by Mail attached. [56]

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Plaintiff above named and to its Attorneys,
Mackay, McGregor, Reynolds & Bennion, 523
West Sixth Street, Los Angeles 14, California:

You and each of you, are hereby advised that the
defendant, United States of America, does hereby
appeal to the United States Court of Appeals for
the Ninth Circuit from the judgment in favor of
plaintiff docketed and entered February 3, 1955, in
the above entitled case.

Dated: March 30, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant [57]

Affidavit of Service by Mail attached. [58]

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes now the defendant-appellant, and moves the Court to extend the time to docket the cause on appeal 50 days under Federal Rule Civil Procedure 73 (g) upon the grounds that the Attorney General of the United States on April 14, 1955, requested a 50-day extension of time within which to docket the appeal in order to enable the Solicitor General of the United States to determine whether an appeal should be taken.

Dated: This 15th day of April, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [59]
Attorneys for Defendant-Appellant

Order

Good cause appearing therefor:

It is hereby ordered that the time within which to file the record and docket the above entitled appeal, from the order for judgment in favor of plain-

tiff entered January 7, 1955, in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including June 6, 1955.

Dated: This 15th day of April, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Presented by:

/s/ ROBERT H. WYSHAK,
Assistant United States Attorney [60]

Affidavit of Service by Mail attached. [61]

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
DOCKET CAUSE ON APPEAL AND
ORDER

Comes now the defendant-appellant, and moves the Court to extend the time to docket the above entitled appeal from the judgment in favor of plaintiff docketed and entered February 3, 1955, 50 days under Federal Rule of Civil Procedure 73 (g) for the reason that the Solicitor General of the United States has not yet determined whether an appeal should be taken.

Dated: This 3rd day of May, 1955.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,
Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [62]
Attorneys for Defendant-Appellant

Order

Good cause appearing therefor:

It is hereby ordered that the time within which to file the record and docket the above entitled appeal from the judgment in favor of plaintiff docketed and entered February 3, 1955, in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including June 28, 1955.

Dated: May 3rd, 1955.

/s/ LEON R. YANKWICH,
United States District Judge

Presented by:

/s/ ROBERT H. WYSHAK,
Assistant United States Attorney [63]

Affidavit of Service by Mail attached. [64]

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Pursuant to the provisions of Federal Rule of Civil Procedure 75 (d), appellant hereby designates the following points upon which it intends to rely on its appeal, to-wit:

(1) The Trial Court erred in adopting the Findings of Fact and Conclusions of Law, filed February 3, 1955;

(2) The Trial Court erred in adopting the Judgment docketed and entered February 3, 1955;

(3) The Trial Court erred in ordering Judgment for the plaintiff in its Minutes, dated January 7, 1955;

(4) The Trial Court erred in overruling the Defendant's Objections to the Proposed Findings of Fact, filed February 2, 1955;

(5) The Trial Court erred in failing to find that [65] the plaintiff had made an overcharge in the sum of \$97,215.00 on the sale of certain of its products;

(6) The Trial Court erred in failing to find that the plaintiff's violation of the Emergency Price Control Act of 1942 and regulations thereunder was the result of intentional and willful acts by the plaintiff;

(7) The Trial Court erred in failing to find that the payment by plaintiff to the Treasurer of the United States in the amount of \$97,215.00 on May 20, 1943, was the result of intentional acts by the plaintiff and its officers with full knowledge of and without regard to the applicable law and regulations under the Emergency Price Control Act of 1942;

(8) The Trial Court erred in failing to find that the plaintiff comprehended the applicable law and regulations as to the ceiling prices on its products and knew at the time of the sales in question that the invoice price was in excess of the ceiling price;

(9) The Trial Court erred in finding that the plaintiff was required to sell its products at its ceiling prices;

(10) The Trial Court erred in finding that the plaintiff's representatives were told by the OPA Enforcement Officials in Los Angeles that they had not violated the intent or purpose of the Act;

(11) The Trial Court erred in finding that the plaintiff took reasonable precautions to avoid violating the OPA law and regulations;

(12) The Trial Court erred in finding that the allowance of the \$97,215.00 payment as a deduction from gross income did not frustrate enforcement of the applicable law and regulations and did not violate public policy; [66]

(13) The Trial Court erred in finding that the payment to the Treasurer of the United States in the amount of the overcharge, \$97,215.00, was an ordinary and necessary business expense.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U.S. Atty., Chief, Tax Division

ROBERT H. WYSHAK,

Asst. U.S. Attorney

/s/ ROBERT H. WYSHAK, [67]

Attorneys for Defendant-Appellant

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

- 2/27/52—Fld. Compl. for Recovery of Taxes. Issd.
Sums. Made Report J. S. 5.
- 2/29/52—Fld. Sums.—Retn. Svd.
- 4/30/52—Fld. stip. & ord. thereon that deft. have
to & incl. 6/27/52 to answer.
- 7/3/52—Fld. stip. & ord. thereon that deft. have to
& incl. 8/26/52 to answer.
- 8/27/52—Fld. stip. & ord. thereon that deft. have
to & incl. 8/26/52 to answer.
- 10/24/52—Fld. Answer.
- 12/ 2/52—Fld. & ent. pre-trial ord. set for 2/9/53,
1:30 p.m.
- 12/11/52—Fld. mot. & fld. ord. thereon cont. pre-
trial hrg. to 5/11/53 at 1:30 p.m.
- 4/ 6/53—Fld. mot. of pltf. & ord. that pre-trial
hrq. to be contd. to 7/13/53 10 a.m.
- 6/ 8/53—Fld. Pltfs. pretrial memo of law.

6/16/53—Fld. stip. & ord. thereon that pre-trial date now set for 7/13/53 be contd. to 9/14/53 at 10 a.m.

8/10/53—Fld. stip. & ord. contg. pre-trial to 10 a.m., 12/14/53.

11/12/53—Fld. stip. & ord. thereon that pre-trial now set for 12/14/53 be contd. to 4/19/54.

4/19/54—Fld. stip. & ord. thereon that pre-trial now set for 4/19/54 be cont. to 5/17/54, 10 a.m.

5/17/54—Fld. stip. & ord. thereon that pre-trial hearg. now set for 5/17/54 be cont. to 6/21/54, 10 a.m.

6/17/54—Fld. stip. & ord. contg. pre-trial proc. to 10 a.m., 7/26/54.

7/ 2/54—Fld. Deft's Not. of tkg. of deposn. on written interrogs. of Chas. W. Triggs, 7/20/54.

7/12/54—Fld. Pltf's Mot. to enlarge time to obj. to interrogs. set for 3 p.m., 7/12/54.

7/12/54—Fld. pltf's mot. for ord. that depos. be tkn. on oral exam. or for lv. to cross-examine orally & for other relief, with memo. of pts. & auths. Fld. affid. of A. Calder Mackay. Fld. affid. of Roland G. Swaffield. [74]

7/12/54—Fld. not. of mot. for 3 p.m. 7/12/54. Ent. proc. on hrg. mot. Ent. ord. granting motion.

- 7/13/54—Lodged proposed stip. & ord. vacating deposns. on written interrogs. & for oral deposn. Chas. W. Triggs.
- 7/19/54—Fld. Stip. & Ord. thereon vacating deposn. on written interrogs. & for oral deposn. of Chas. W. Triggs.
- 7/22/54—Fld. Stip. & Ord. thereon that deposn. of Chas. W. Trigg now set for 7/19/54 be tkn. wk. commeneg. 8/2/54. Fld. Stip. & Ord. thereon that pre-trial hearng. now set for 7/26/54 be contd. to 9/27/54 at 10 a.m.
- 9/27/54—Pre-trial hrg. contd. to 10 a.m. 10/4/54.
- 9/28/54—Fld. Stip. & Ord. thereon that pre-trial hearng. now set for 9/27/54 be contd. to 10/4/54 at 10 a.m.
- 9/30/54—Fld. pre-trial memo. of Law by USA.
- 10/ 4/54—Ent. ord. contg. to 10 a.m. 11/8/54 pre-trial hrg.
- 10/15/54—Fld. depos. Charles W. Triggs tkn. 8/5/54.
- 11/ 8/54—Ent. ord. contg. fur. pre-trial to 10 a.m. 11/22/54 ent. ord. settg. for trial 9:30 a.m. 12/10/54.
- 11/23/54—Ent. proc. on fur, pre-trial hrg.; fld. pre-trial stip. of facts; fld. plf's pre-trial stmnt. of issues. Ent. ord, contg. trial from 12/10/54 to 10 a.m. 12/20/54.
- 12/16/54—Ent. ord. contg. trial to 2 p.m. 1/3/55.
- 1/ 3/55—Ent. ord. vacating trial date of today & contd. to 10 a.m. 1/10/55 for resetting.
- 1/ 5/55—Fld. supp. pre-trial memo. of law of plf.

- 1/ 6/55—Ent. ord. off cal. for trial & placed on cal. 10 a.m., 1/10/55 for setting. Ent. procs. trial bef. J. Yankwich. Fld. dfts. trial memo. Fld. suppl. pre-trial stip. of facts. Ent. ord. all procs. be held under true name plf. which is now "Star-Kist Foods, Inc." Fld. ex. Ent. ord. contg. 1/7/55. fur. trial.
- 1/ 7/55—Ent. procs. (Y) fur. trial. Ent. ord. jgmt. be favor plf. amt. to be computed under local rule 7.
- 1/11/55—Fld. Ord. trfg. case to Ct. of Hon. Leon R. Yankwich for all fur. predgs. per Rule 2. Attys. Ntfd.
- 1/21/55—Lodged proposed findings fact & concls. law; & lodged proposed jgmt.
- 1/26/55—Ent. ord. dft. hv. fur. extension time until 5 p.m., 2/2/55 to present objs. to prop. findgs. & jgmt. [75]
- 2/ 2/55—Fld. Deft's objs. to proposed findings.
- 2/ 3/55—Fld. finds. fact & concls. law & fld. dktd. & ent. judg. fv. plf. & against deft. in amts. of \$59,253.44 and \$52,105.58 with int. etc., Not. attys. JS6.
- 3/ 8/55—Fld. USA's not. of appeal with affid. of svce. by mail as to Mackay, McGregor, Reynolds & Bennion, 728 Pac. Mut. Bldg., 523 W. 6th St., LA 14, Calif.
- 3/30/55—Fld. deft's Not. of Appeal. Mld. copies to Mackay, McGregor, Reynolds & Bennion, 728 Pac. Mut. Bldg., LA 14.

- 4/15/55—Fld. Mot. of USA for extension of time to docket cause on appeal to & incldg. 6/6/55 & ord. thereon together with affid. of svce. by mail.
- 5/ 3/55—Fld. defts. mot. with ord. thereon that sd. deft. hv. time in which to dkt. appeal extended 50 days.
- 6/ 3/55—Fld. USA's designation of contents of record on appeal. Fld. appelts. stmt. of pts. to be relied upon on appeal.
- 6/ 9/55—Fl. plf-appellees desig. of addl. contents of rec. on appeal.
- 6/20/55—Fld. reporter's Transc. of procs. for 1/6, 1/7/55. [76]
-

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 71, inclusive, contain the original

Complaint;

Summons;

Defendant's Answer;

Pre-Trial Stipulation of Facts;

Supplemental Pre-Trial Stipulation of Facts;

Findings of Fact and Conclusions of Law;

Defendant's Objections to Proposed Findings of Fact;

Judgment;

Notice of Appeal filed March 8, 1955;

Notice of Appeal filed March 30, 1955;

Motion for Extension of Time to Docket Cause on Appeal and Order; filed April 15, 1955;

Motion for Extension of Time to Docket Cause on Appeal and Order filed May 3, 1955;

Appellant's Statement of Points to be Relied upon on Appeal;

Designation of Contents of Record on Appeal;

Plaintiff's-Appellant's Designation of Additional Contents of Record on Appeal, which, together with a full, true copy of the Minutes of the Court had on January 7, 1955; one photostatic copy of Docket Entries; one volume of reporter's transcript of proceedings had on January 6 and 7, 1955; and plaintiff's exhibits 1 to 36, inclusive; all in said cause; constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has not been paid by appellant.

Witness my hand and the seal of said District Court, this 22nd day of June, 1955.

[Seal]

JOHN A. CHILDRESS,

Clerk

/s/ By CHARLES E. JONES,

Deputy

In the United States District Court for the Southern District of California, Central Division

Civil No. 13867-Y

STAR-KIST FOODS, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

TRANSCRIPT OF PROCEEDINGS (Partial)

Los Angeles, California, January 6, 1955

Honorable Leon R. Yankwich, Judge presiding.

Appearances: For the Plaintiff: Messrs. Mackay, McGregor, Reynolds & Bennion, by A. Calder MacKay; Arthur McGregor and Stafford Grady, 523 W. 6th St., Los Angeles, Calif. For the Defendant: Laughlin E. Waters, U. S. Attorney, by Edward R. McHale, Chief, Tax Division; Robert H. Wyshak, Asst. U. S. Attorney. [1*]

Thursday, January 6, 1955, 3:20 p.m.

* * * * *

HERMAN A. GREENBERG

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Herman A. Greenberg, G-r-e-e-n-b-e-r-g.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Herman A. Greenberg.)

Direct Examination

By Mr. Grady:

Q. What is your occupation?

A. I am a lawyer.

Q. Are you practicing law now?

A. I am, sir.

Q. Where? A. Washington, D.C.

Q. Would you give us a brief summary of your educational background? Where did you graduate from law school?

The Court: I don't think that is material. Were you with the OPA before?

The Witness: Yes, sir.

The Court: He is not testifying as an expert, so let's eliminate that and let's get down to his official capacity so as to see what part he had in this and how far he is competent to testify as to official policy. Not that I [3] wouldn't like to hear it. I always like to hear the educational background of Government men. I think there are some very fine men who perform Government service despite the present attitude about men in the Government service. So let us eliminate that.

Mr. Grady: Yes, your Honor.

Q. By Mr. Grady: Mr. Greenberg, you were associated with the Office of Price Administration during 1942 and 1943, were you not?

A. Yes, sir.

Q. In what capacity?

A. During 1942 and part of '43 I was chief of the Meat and Dairy Branch of the Enforcement

(Testimony of Herman A. Greenberg.)

Division, and shortly thereafter became the director of the Food Enforcement Division of the OPA.

Q. What were your responsibilities in those two positions?

A. As far as number of commodities are concerned, or——

Q. Just generally.

A. Well, the responsibility was the overall supervision of the enforcement of the regulations referring to food.

Q. Was tuna, canned tuna fish one of the products which came under your jurisdiction?

A. Yes, sir. [4]

Mr. Grady: I would like to have this document marked for identification, please.

The Clerk: Plaintiff's Exhibit 1 marked for identification only.

(The document referred to was marked Plaintiff's Exhibit 1 for identification.)

Mr. Wyshak: May I see it, counsel?

(Whereupon the document was handed to counsel for the defendant.)

Q. By Mr. Grady: I show you what has been marked Plaintiff's Exhibit 1 for identification and ask you if you can identify it?

A. Yes, I can.

Q. What is it, please?

A. This is a memorandum dated June 5, 1943, written by me, initialed by me, and addressed to

(Testimony of Herman A. Greenberg.)

the San Francisco Regional Office of the OPA concerning the French Sardine Company, Inc., of Terminal Island.

Mr. Grady: Would it be agreeable to your Honor to have Mr. Greenberg read it aloud. It is relatively short.

The Court: I can read it faster than he can. You ask him a question on it. I can read it and you place a question on it.

Q. By Mr. Grady: You prepared that memorandum, did you, Mr. Greenberg? [5]

A. Yes, sir.

Q. Are you now familiar with the French Sardine case after all these years? Your recollection has been refreshed?

A. My recollection has been refreshed by this memorandum and various other documents, letters, particularly which were sent by the company to Mr. Charles Triggs, which I have seen.

Q. And were those letters and memoranda and telegrams available to you at the time you wrote this memorandum?

A. Yes. From the memorandum itself it appears that I had just had a conversation with Mr. Charles Triggs concerning this matter, at which time I saw the file. And more lately I have again seen the papers that were in that file, and that refreshed my recollection.

Q. Now, in one place in this memorandum you state that there are substantial reasons, I believe, for accepting single damages?

(Testimony of Herman A. Greenberg.)

A. Yes. I wrote, "On the basis of Mr. Triggs' statement to us it appears that there is a substantial reason for accepting single damages."

The Court: Mr. Triggs was the regional director?

The Witness: No, sir. If I may explain, Mr. Triggs was the price executive of the Fish Price Branch in Washington, and he had——

The Court: A Government official?

The Witness: Oh, yes. He is an employee of the OPA, [6] but he issued the regulations and we enforced them. He was the price executive and we were the enforcement crew.

The Court: In other words, I notice throughout this memorandum which I read you took the view that you have to rely upon the advice of these other men rather than be put in the position of exercising judgment for matters which are more within their cognizance.

The Witness: Well, we generally took a position—we had a large number of offices, as you well know. They had the operating responsibility. We had the policy and supervisory responsibility, and we, of course, relied on them for facts and we made no attempts at investigation at all.

The Court: But in this case you relied on Mr. Triggs' decision?

The Witness: To some extent. I was not bound by his decision.

The Court: And also the regional director.

The Witness: Oh, of course.

(Testimony of Herman A. Greenberg.)

The Court: The regional director is the head man.

The Witness: Yes.

The Court: All right.

Mr. Wyshak: Your Honor, I am going to move to strike this testimony on the basis of what is in the administrative file, and we don't have the file——

The Court: Overruled. [7]

Q. By Mr. Grady: Mr. Greenberg, you mentioned in that memorandum there were substantial reasons for accepting the single damages. Would you state what those reasons were, sir?

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Witness: I would say, based on the documents and my recollection—and if your Honor would allow me for a moment, I think it is of some importance—this was 1943. The war was going badly for us at that time. We were under the most insistent pressure at the time, both from Congress and other sources, to——

Mr. Wyshak: Your Honor, would you advise the witness to stick to answering the question?

The Court: He is doing all right. He says he wants to give a little background, which is all right. Go ahead.

The Witness: ——to enforce these regulations vigorously. That we attempted to do. And your Honor was quite correct in your statement some-time ago that the administrator at all times was

(Testimony of Herman A. Greenberg.)

allowed under the law to accept less than treble damages.

We had a firm administrative enforcement policy within the agency that we would not accept less than treble——

Mr. Wyshak: Your Honor, I object to that as immaterial and irrelevant, as to what the OPA policy was with respect to these cases. It is up to your Honor to examine the facts [8] and determine whether this is an intentional violation or not.

The Court: Well, the official memorandum is merely a memorial of what was done, and the man who wrote the memorandum can testify to the reasons, where they are not all set forth.

Mr. Wyshak: Well, in any event, we are not concerned with what the general policy was.

The Court: We are concerned with the policy of what was done in this case, whether they were given the benefit of privilege or whether they merely treated them as other people who had exceeded the price ceiling.

As I told you before, once I begin a case, don't expect me to decide it on anything except a full hearing of the facts. You are acquainted with that, now.

Mr. Wyshak: I am. I still feel we are bound by the rules of evidence.

The Court: That is right; and I believe in the rules of evidence. You told me you were a Massachusetts lawyer. You had better get acquainted with the facts on the civil side of this court. You see,

(Testimony of Herman A. Greenberg.)

we are not bound by any rules of evidence except those which we think are reasonable, and therefore, if law is allowed under the statutes, if the law is allowed under general rules, we are to favor the rules of admissibility.

I will give you a few articles I have written on the subject if you want to become more acquainted with them. [9]

Mr. Wyshak: I would appreciate it, your Honor.

The Court: All right. I have been at this for many years, and I know what the rules of evidence are. And the rules on the civil side are those which favor admissibility. And since the rules were promulgated, the civil rules, in 1938 not one case has been reversed by the Court of Appeals for the Ninth Circuit on inadmissible evidence. In fact, the present rule of the Ninth Circuit was expressed by Judge Garrett, in a case which I will call to your attention very shortly, in which he said at the present time we have the same rule as in equity, everything is admissible with the understanding that the judge will disregard what is immaterial. That is the law of the Ninth Circuit.

Let us continue. We are getting acquainted, you see. He is new in the court. So we are getting acquainted. Let us go on.

The Witness: At that time in 1943, as I said, we were under instructions to proceed very vigorously in the enforcement of these regulations, and we did to the utmost of our ability. Now then, we were allowed under the law, it was the proper interpre-

(Testimony of Herman A. Greenberg.)

tation, that the administrator having instituted a treble damage action which he was entitled under the statute could accept in settlement a lesser sum. Theoretically, I suppose, he could take less than single damages in the settlement. However, as a strict administrative [10] policy, which we adhered to at that time, our instructions from the Washington office to our regional office and district offices was that under no circumstances, with one exception, would less than treble damages be accepted in a claim by the administrator. That exception was where we were satisfied that the violation was innocent and inadvertent and non-willful. Only in that case were they to accept less than treble damages, with this additional exception, if I may say: That even where we insisted on treble damages we of course allowed a payment of a lesser sum on a showing of financial inability to pay. But as I take it, that is not involved here.

Now then, with that policy in mind it was necessary for me at the time that I wrote this memorandum to make a decision. The Los Angeles District Office of the OPA, which was negotiating this with the French Sardine Company, realized that it could not accept a single damage settlement under our policy unless a showing of inadvertence and nonwillfulness was made; and it was for that reason that the Los Angeles District Office, which had normally the authority to settle its own cases, wrote to Washington to get permission on a showing of the facts to settle this for less than treble damages

(Testimony of Herman A. Greenberg.)

—that is, single damages—pointing out that in their opinion this was a nonwillful, inadvertent type of violation. [11]

Mr. Wyshak: Your Honor, I object to that as hearsay.

The Court: Overruled.

The Witness: This memorandum is a statement of our belief, after canvassing the facts, that this was a nonwillful, inadvertent type of violation.

The Court: All right.

Mr. Wyshak: Your Honor, I move to have that stricken as a conclusion of the witness.

The Court: It will be denied. What is the status of that? Has that been received?

Mr. Grady: I have not introduced it. I will do so now. I now offer what has been marked Plaintiff's Exhibit 1 for identification in evidence.

Mr. Wyshak: I object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: The objection is overruled for the reasons already stated in the course of argument. Counsel, I am not trying to go back of an OPA determination. I am merely trying to show that under the very ruling of the case that counsel for Government has said this was not a fine imposed for willful violation but recovery of an amount of overcharge under circumstances which did not show willfulness but showed justification for accepting it. So that it may be argued that this recovery was necessary business because they had taken the money under the representation to the [12] parties

(Testimony of Herman A. Greenberg.)

that possibly the OPA wouldn't allow it; and then have to give it to the Government—whether it went back to the dealers themselves doesn't matter—have to give it to the Government when the Government, after it is too late for them to adjust the matter with the individual dealer, sought to recover the entire amount of the overcharge.

Mr. Wyshak: Your Honor, my feeling was that the intent of the plaintiff should be evidenced by the act of the plaintiff and not what the OPA thought or did.

The Court: Oh, no, no; because otherwise they go on—as a matter of fact, they are giving you the benefit by showing that the OPA accepted what they did. You can always ask a plaintiff, when intent is material, “What did you intend to do?” That is always permissible in a civil case or a criminal case where intent is material. But they are going further. They are showing that that intent was communicated to the OPA and the OPA accepted that as an indication of good faith, and they are giving you the benefit of more than you are entitled to; not of them saying, “This is proving it,” but, I mean, this is the direction in which the proof is going.

(The document referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

[See page 197.]

Q. By Mr. Grady: Mr. Greenberg, you state in this memorandum that you had a conversation with Mr. Triggs. [13]

(Testimony of Herman A. Greenberg.)

A. That is correct.

Q. Would you state the substance of that conversation, sir?

Mr. Wyshak: Your Honor, I object to that as calling——

The Court: Overruled.

The Witness: My best recollection is that on receipt of this memorandum from the Los Angeles District Office of the OPA I went to see Mr. Triggs and asked him what conversations and negotiations he had had with the French Sardine Company. He advised me generally of those conversations and showed me a file which he had which consisted of written communications from the French Sardine Company from which all these facts appeared—that is, the fact that the company had been caught with a very low ceiling price under the general maximum regulations, that they had continued to can tuna but put it in inventory because they had stated they couldn't afford to sell at their ceiling price because of the increased price of raw tuna; that this was going on for a long period of time; was becoming burdensome to the company; that they inquired of Mr. Triggs what relief they could have; that Mr. Triggs assured them a dollar and cent regulation would issue and that probably the price would be in the neighborhood of \$12 a case; that nevertheless the company refrained from shipping tuna until finally with the regulation, the dollar and cent regulation not issuing, in [14] desperation

(Testimony of Herman A. Greenberg.)

they come back to Triggs and between them they advised the Government wholly——

Mr. Wyshak: I move to have that stricken, your Honor——

The Court: Overruled.

The Witness: ——that the French Sardine Company kept Mr. Triggs advised and suggested to him that they ship this tuna at \$12 a case with an agreement with their customers if and when the dollar and cents regulation issued, if it came out anything less than \$12 they would refund the difference to them.

I discussed with Mr. Triggs whether he had those conversations and he agreed that, generally, he had had those conversations; he was very much in sympathy with the position of the company. I took the position myself—it was my duty to make a decision, and I took the position myself that the company had acted aboveboard, no willfulness, as we understood it, willfulness which we ran into in great number in those years, and which consisted of fraud of one kind or another, double entry, double sets of books, cash on the side and that sort of thing, but this company to the contrary had operated absolutely in the open; and that they had discussed their matter with a person who has ostensible authority for the Government—that is, Mr. Triggs. Mr. Triggs is a fine gentleman. And that they then proceeded on the basis of [15] their discussions with Mr. Triggs, and I felt that this fit our policy of innocence and inadvertence, that the company

(Testimony of Herman A. Greenberg.)

did what it could and reasonably proceeded the way it did as a general exception to our rule of acceptance of single damages.

Q. By Mr. Grady: Would you state just briefly the relationship between the enforcement branch and the price branch? I understand you were from the enforcement branch and Mr. Triggs was from the price branch.

A. That is quite true. The price branch which was the largest division of the OPA, had the responsibility of issuing price regulations. We in the enforcement branch were all lawyers. These gentlemen in the price branch came from industry, as Mr. Triggs, and had experience in this matter, in this particular industry. We were lawyers, and our duty was to enforce regulations. We operated independently of the price branch. That is, they had no authority over us to tell us when to bring a case and when not to bring a case. But of course we worked very closely with them to know what was going on in these industries and to generally be taught by them, and the relationship was a very close one.

Q. Now, you state in this memorandum, and I quote: "He assured us—" meaning Mr. Triggs—"assured us that at no time did he either recommend [16] violation of the regulation or suggest that he might quash any proceedings for violation of the regulations." Does that recall to your mind any particular impressions you had after discussing this matter with Mr. Triggs?

(Testimony of Herman A. Greenberg.)

A. Yes. The Los Angeles district office in writing to me stated that an official of the French Sardine Company had informed them that they discussed this matter with Mr. Triggs; that Mr. Triggs told them to go ahead and sell at the \$12 price; and that if any difficulty arose because of it he, Triggs, would see to it that the sardine company was protected; that is, that no lawsuit would be instituted against them.

Now, Mr. Triggs, as I stated, was an honorable man. He is a fine gentleman. His background is the fish industry. He is back in the fish industry now although he is past the age of eighty. And I knew him well and respected him. But his orientations, I might say, were a little different from ours as lawyers—we were not industry men—and I could easily understand Mr. Triggs telling a company to go ahead and do this even though he might not have the authority to carry it through himself. And this added to my feeling that the company was quite right. They were dealing with an official of the OPA and they had a right to rely upon what he told them.

Q. One final question: Are you being paid any fee [17] for testifying in this case?

A. No. I would not accept a fee.

Q. Do you recall showing Mr. Triggs the check in Washington during your conversation at that time?

A. Yes. That check, which I saw again recently, had been sent on—that is, the check of the sardine

(Testimony of Herman A. Greenberg.)

company for \$90,000 had been sent on by the Los Angeles district office with its memorandum, and on the advice to them that we approved the settlement, we deposited that check with the Treasury in Washington.

Mr. Grady: No further questions, your Honor.

The Court: All right.

Cross Examination

By Mr. Wyshak:

Q. Would you straighten me out, Mr. Greenberg? It isn't clear in my mind. Did Mr. Triggs tell you he had or hadn't told the representative of the French Sardine Company it was all right to raise their prices——

A. Mr. Triggs told me generally of the conversation and communications he had with the sardine company; very sympathetic with their position. And he told me that he had advised them that a dollar and cent regulation would issue at about \$12, which incidentally it did. By the time I had this memorandum I believe the regulation had issued at \$12. On the precise point of whether he told the sardine company [18] that if a case came across his desk he would quash it, in answer to my direct question he denied to me—he said he never said quite that. But I came away with the general impression—and that is the result of that, the memorandum that is now in evidence and that I wrote—that he told the company enough so that they had a right to rely on his word as an official——

(Testimony of Herman A. Greenberg.)

Q. Can you remember his exact words?

A. That, sir, would be extremely difficult for me. I would not attempt——

Q. Can you tell us generally what he said rather than what your impression was?

A. There is a very fine point of difference of what he said rather than my impression of what he said. I am afraid that all I have now is my recollection of what it was.

Q. What is that?

A. I have stated it. I would be glad to state it again.

The Court: That won't be necessary. Give us the substance of the conversation.

Q. By Mr. Wyshak: You haven't answered my original question. Did Mr. Triggs tell you he would tell them it would be all right for them to raise their prices?

A. Mr. Triggs stated to me that he was most sympathetic with the position of the company; that they were caught [19] with a low ceiling price; that he knew all the time that the ceiling price would come out at about \$12 and that for them to hold tuna fish, which the country needed at that time, and not to be able to ship it struck Triggs as difficult, and all he denied to me was, in answer to my precise question, "Charlie, did you tell them that you would quash a case," to this he said no. And of course I don't know exactly what Charlie did tell them as to that.

Mr. Wyshak: Mr. Reporter, would you read my

(Testimony of Herman A. Greenberg.)

question? See if you can answer it yes or no, Mr. Greenberg.

Mr. Grady: I submit that the witness has answered it.

The Court: I think he has given an explanation. I think he could answer yes or no, and then let the explanation stand with it.

Did he tell you specifically that he advised momentarily the raising of the price within the hope that it would later on be made official? That is the point. It is evidence that they billed their dealer with a notation that it was likely that the price might be disapproved. If you don't remember, why, just say so.

The Witness: I cannot recall to answer that question yes or no, or any differently, your Honor, than I did answer it.

The Court: All right.

Q. By Mr. Wyshak: How would you explain this, "He [20] assured us that at no time did he either recommend violation of the regulation—" and so forth?

A. That is what I was referring to before when I said that Mr. Triggs denied to me that he told them that if the case arose he would quash it.

Q. Well, I mean, doesn't this mean that he did not tell them to raise their prices since that clearly would be a violation of the regulation?

A. May I see the memorandum? I think the memorandum speaks best for itself. The first sentence, "You will note that on page 2 of the memo-

(Testimony of Herman A. Greenberg.)

randum Charles W. Triggs is quoted to the effect that he advised the French Sardine Company to violate GMPR and that he would quash any complaints that might be made because of the violation. It appears that the Los Angeles District Office took the exparte statement of an officer of the company as the basis for accepting single damages in settlement of the Administrator's treble damage action. On receipt of the memorandum we had a long discussion with Mr. Triggs. He assured us that at no time did he either recommend violation of the regulation or suggest that he might quash any proceedings for violation of the regulation."

The Court: But he was as you say sympathetic to their plight?

The Witness: Yes, sir.

The Court: And after they were caught short he [21] recommended the acceptance of the single penalty on the basis of what he had talked to them before?

The Witness: My recollection, sir, is that Mr. Triggs probably went a little further than that, and——

Mr. Wyshak: You don't know of your own knowledge, though?

The Court: Well, I mean, he is talking about this conversation with Triggs.

The Witness: I am speaking of my recollection, of course.

The Court: Tell us—I don't want to get dizzy. You are going around and around.

(Testimony of Herman A. Greenberg.)

The Witness: It is very difficult, sir.

The Court: I know it is difficult. But if you remember he went further, what did he say. I try to summarize what I take to be your narrative of the conversation.

The Witness: My recollection of what he said in that regard was that these people were decent people and kept him informed of the procedure they had taken, that his own feeling was that he could see no harm in this, but he——

Mr. Wyshak: No harm in what?

The Witness: In the sale of this fish at \$12 a case prior to the——

Mr. Wyshak: Over the ceiling? You mean see no harm in it?

The Witness: ——regulation.

The Court: Promulgation of the regulation?

The Witness: Yes, sir, because he had information that such a regulation had issued.

The Court: And told them of that?

The Witness: Yes. In other words, Triggs did not go so far to me as to say, "I told them to go ahead and do it and that if anything happened I would take care of it." That is an official statement he could not make——

The Court: As a Government official he could say, "Now, look, I think that regulation is going to be made;" but you can't tell them to anticipate it and act on it before it is made. It wouldn't be good governmental policy.

The Witness: I would agree with that. But whe-

(Testimony of Herman A. Greenberg.)

ther Triggs at this point adhered to the best governmental policy, I don't know.

The Court: Maybe somebody else who talked to Triggs may testify differently. That is the best of your recollection?

The Witness: Yes.

The Court: All right.

Q. By Mr. Wyshak: Then, just to summarize, as far as you know Triggs never told them it was all right for them to raise their prices, in so many words?

A. Just to summarize, I would say my recollection is that Triggs told them it wouldn't be so bad if they did.

The Court: It is a negative; almost like Amos and Andy. [23] All right.

Mr. Grady: May I ask one further question, your Honor?

The Court: Yes.

Redirect Examination

By Mr. Grady:

Q. Mr. Greenberg, was the acceptance of single damages a penalty against this company?

A. We did not so——

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: He has already testified that the policy was in the department, and it is the policy of the law that where you merely take back the overcharge, whether it goes to the Government indi-

(Testimony of Herman A. Greenberg.)

vidually, there is no penalty, merely taking back a transaction he had no right to make.

Mr. Grady: That is exactly what I intended to bring out, and——

The Court: That, however, is merely a conclusion to be drawn from the facts. And Mr. Greenberg has stated that my summary of the law was a correct one of what the policy was at that time.

Mr. Grady: I have no further questions.

The Court: All right.

The Witness: Thank you, your Honor. May I say, your Honor, that I have been at the bar for 21 years and this is [24] the first time I was a witness.

The Court: Well, I think you did pretty well. Most lawyers forget their role as a witness and try to be an advocate. I think you did very well.

I think this witness has flown here and if you want me to discharge him from the subpoena, I will release him. I don't know whether his plane——

The Witness: I would not be leaving this evening in any event.

The Court: As far as we are concerned you are through.

The Witness: Thank you, sir.

The Court: All right, call your next witness.

Mr. Grady: Your Honor, we have two other witnesses, the first of whom will be very short, I believe.

The Court: Put him on. Remember I have a lot of things to do, and as long as the case cannot be

finished today, let us put on a short witness and finished, because I probably have things to sign before I leave.

Mr. Mackay: We recognize that, your Honor. We will be glad to.

EARL M. NIELSEN

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Earl M. Nielsen, N-i-e-l-s-e-n.

Direct Examination

By Mr. Grady:

Q. Mr. Nielsen, during the period beginning 1941 until 1950 were you associated with the High Seas Tuna Company?

A. Yes, I was general manager of the High Seas Tuna Company.

Q. And who was president of that company?

A. Mr. Bogdonovich.

Q. Which Bogdonovich?

A. Martin Bogdonovich.

Q. In your capacity as general manager did you negotiate the ceiling prices your company had on canned fancy light meat tuna?

A. Yes, I did with the OPA in the San Diego branch office.

Q. What was your price basis on 48 halves, or on fancy light meat tuna?

Mr. Wyshak: I can't see the materiality for that.

The Court: Overruled.

(Testimony of Earl M. Nielsen.)

The Witness: We applied to the OPA for a ceiling, gave them the information they requested, and they in turn sent a deputy to go through the books and check our sales in March. They granted us a \$15 price. And that was in April. And then at the later date, 30 days later, came back again and rechecked, and as I recall there was a change in price at the [26] Sun Harbor Company, was reduced two dollars, and they reduced us down to an even break, \$14, too.

Q. Did it remain at \$14 until the new regulation came out in January 1943? A. Yes, it did.

Q. Now, to whom did you sell tuna during that period?

A. I sold tuna to the French Sardine Company, Inc., and through brokers to the trade.

Q. And what price did you sell to the trade through your brokers? A. \$14.

Q. And what price did you sell to the French Sardine Company? A. \$11.

Mr. Grady: I have no further questions, your Honor.

The Court: All right, Mr. Wyshak?

Mr. Wyshak: No questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Mackay: We have a witness, your Honor, whom I don't think we will get through with before 5:00 o'clock.

The Court: Does the Government have any testimony?

Mr. Wyshak: Not right now, your Honor.

The Court: I don't think we need rush. It can't be concluded tonight anyway, so we will take our regular [27] adjournment and then finish the testimony and I will hear what the Government has to say and then I will hear any argument you desire to present. So long as we have started, why, there is no rush.

All right, gentlemen, 10:00 o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, January 7, 1955.) [28]

Friday, January 7, 1955; 10:00 a.m.

The Court: All right.

Mr. Grady: Your Honor, we have some documentary evidence we would like to introduce next.

The Court: All right.

Mr. Grady: There are 11 letters and telegrams in a group, all of which have been taken from the files of the Office of Price Administration, which are now reposed in the archives of the United States at Washington; and they have been certified. Copies have been furnished the Government several weeks ago. I don't know whether the Government has any objection to any of them or not. I would like to introduce them all as a group if it is agreeable to the Government.

The Court: I think it is better to do than individually so that the Government can determine whether they desire to object to any particular ones

or not. If you put them in a group you don't know. You may lose the benefit of one of them because another one may be bad.

Mr. Grady: Your Honor, I would like to hand you the original group so you may rule upon them as the Government makes an objection.

First I offer in evidence a telegram from the French Sardine Company to Charles M. Elkinton dated July 29, 1942.

Mr. Wyshak: Your Honor, may I inquire whether these [30] letters constitute the whole administrative file? If they do not I am going to object on the grounds that they are merely a portion of the administrative file, and we don't have the file.

The Court: That is not a good valid objection. The Government is free to offer the rest. It is **not** incumbent upon any litigant to offer anything but those things that they think bear upon the matter. The opponent, especially an opponent who has possession of these matters, had the opportunity of offering the others.

Mr. Grady: May that be admitted, your Honor?

The Court: It may be received, and the letter or telegram identified will be given a number. We will take the first one at the top.

The Clerk: Exhibit No. 2 in evidence.

(The document referred to, marked Plaintiff's Exhibit 2, was received in evidence.)

[See page 200.]

Mr. Grady: As Plaintiff's Exhibit No. 3, your

Honor, I offer a telegram from the French Sardine Company to Charles M. Elkinton dated August 10, 1942.

The Court: All right. It may be received.

The Clerk: That's Plaintiff's Exhibit No. 3 in evidence.

(The document referred to, marked Plaintiff's Exhibit 3, was received in evidence.)

[See page 201.]

Mr. Grady: As Plaintiff's Exhibit No. 4, your Honor, [31] a letter from A. T. Williams of the French Sardine Company to the Office of Price Administration dated September 2, 1942.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 4 in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

[See page 202.]

The Court: That letter has two pages.

Mr. Grady: Yes.

The Court: Two pages and an exhibit.

Mr. Grady: As Plaintiff's Exhibit No. 5, your Honor, I offer in evidence a three-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Head, Canned Fish Section, Office of Price Administration, dated September 24, 1942.

Mr. Wyshak: Your Honor, with respect to that exhibit and the previous one, I assume they are only being admitted for the purpose of what the plain-

tiff's intent was rather than the truth of the matters asserted therein.

The Court: That is right. All of these bear to the absence of intent to violate the law so as to lay a factual foundation for the argument that the penalty paid in the civil suit by the OPA was a legitimate business expense which should be deducted.

Mr. Grady: As Plaintiff's Exhibit No. 6, your Honor,— [32]

The Clerk: Just a moment. Is that exhibit received?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 5 in evidence.

The Court: The letter of September 24th. It has three pages.

(The document referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

[See page 205.]

Mr. Grady: As Plaintiff's Exhibit No. 6, I offer in evidence a three-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Head, Fish Section, Office of Price Administration, dated November 6, 1942.

Mr. Wyshak: I would like to object to that on the grounds that it is self-serving, hearsay, immaterial and irrelevant since it contains argument in there after the sales that were made over the ceiling price.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 6 in evidence.

(The document referred to, marked Plaintiff's Exhibit 6, was received in evidence.)

[See page 208.]

Mr. Grady: As Plaintiff's Exhibit No. 7, your Honor, I offer in evidence a two-page letter from Mr. A. T. Williams, French Sardine Company, to Mr. Charles W. Triggs of the Office of Price Administration, dated November 6, 1942.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled. It may be received. [33]

The Clerk: No. 7 in evidence.

(The document referred to, marked Plaintiff's Exhibit 7, was received in evidence.)

[See page 210.]

Mr. Grady: As Plaintiff's Exhibit No. 8, your Honor, I offer in evidence a letter from A. T. Williams of the French Sardine Company to the Office of Price Administration, 1037 South Broadway, Los Angeles, California, dated November 16, 1942.

Mr. Wyshak: Same objection.

The Court: Denied.

The Clerk: That is No. 8 in evidence.

(The document referred to, marked Plaintiff's Exhibit 8, was received in evidence.)

[See page 213.]

Mr. Grady: As Plaintiff's Exhibit No. 9 I offer in evidence a handwritten letter of A. T. Williams to Charles W. Triggs, dated December 5, 1942, enclosing several other letters.

Mr. Wyshak: Same objection.

The Court: Overruled. Received in evidence.

The Clerk: Exhibit No. 9 in evidence.

(The document referred to, marked Plaintiff's Exhibit 9, was received in evidence.)

[See page 215.]

Mr. Grady: As Plaintiff's Exhibit No. 10 I offer in evidence a three-page letter from A. T. Williams, French Sardine Company, to the Office of Price Administration, [34] dated December 5, 1942. This letter is addressed to the Office of Price Administration, 1037 South Broadway, Los Angeles, California.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 10 in evidence.

(The document referred to, marked Plaintiff's Exhibit 10, was received in evidence.)

[See page 215.]

Mr. Grady: As Plaintiff's Exhibit No. 11, your Honor, I offer in evidence a one-page letter from A. T. Williams of the French Sardine Company to Charles W. Triggs, Office of Price Administration, Washington, D. C., dated April 29, 1943.

Mr. Wyshak: Same objection.

The Clerk: Is that admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 11 in evidence.

[See page 219.]

Mr. Grady: As Plaintiff's Exhibit No. 12 I offer in evidence a letter from Charles W. Triggs to Mr. A. T. Williams of the French Sardine Company dated May 6, 1943.

Mr. Wyshak: Same objection, your Honor.

The Court: Objection overruled. It may be received.

The Clerk: Exhibit No. 12 in evidence.

(The document referred to, marked Plaintiff's Exhibit 12, was received in evidence.)

[See page 220.] [35]

Mr. Grady: As Plaintiff's Exhibit 13, your Honor, I offer a four-page letter addressed to Mr. Triggs and signed by A. T. Williams of the French Sardine Company, dated May 6, 1943.

Mr. Wyshak: Same objection.

The Court: It may be received in evidence.

The Clerk: Plaintiff's Exhibit No. 13.

(The document referred to, marked Plaintiff's Exhibit 13, was received in evidence.)

[See page 221.]

Mr. Grady: As Plaintiff's Exhibit 14 I offer in evidence a letter dated May 19, 1943, from Mr. Charles W. Triggs to Mr. A. T. Williams of the French Sardine Company.

Mr. Wyshak: Same objection.

The Court: Objection overruled. Received in evidence.

The Clerk: That is Plaintiff's Exhibit No. 14, in evidence.

(The document referred to, marked Plaintiff's Exhibit 14, was received in evidence.)

[See page 225.]

Mr. Grady: As Plaintiff's Exhibit No. 15, your Honor, I offer in evidence a letter dated—well, it really has two dates on it, one typed in, I believe, is July 7, 1943, and another stamped in is July 9, 1943.

The Court: The date received.

Mr. Wyshak: Same objection.

Mr. Grady: It is from Charles W. Triggs to Mr. A. T. [36] Williams of the French Sardine Company.

The Court: All right. Objection overruled, Received in evidence.

The Clerk: That's Plaintiff's Exhibit 15 in evidence.

(The document referred to, marked Plaintiff's Exhibit 15, was received in evidence.)

[See page 226.]

Mr. Grady: Your Honor, we would like to read those letters to the court if it be permissible.

The Court: Well, I don't want it as part of this. You can do it as part of the argument. Pick out the things you want. I don't like to stop, even when I try cases to the jury. You can do it as part of the argument. Either in the record, be transcribed in the record to be prepared and I will read them. I haven't time to read them this morning at the rate you have put them in, but I will read them before I decide the case.

Mr. Grady: Surely. Now, your Honor, as our next group of exhibits we would like to offer in evidence several of the regulations promulgated by the Office of Price Administration, all of which are recorded in the Federal Register. And for the convenience of the court we have attempted to have copies made of those which we think are pertinent so your Honor would have them available.

I apologize for the copies in a couple of instances. We have had to have pages of the Federal Register photostated and [37] they didn't turn out too well. But we did the best we could.

As our next exhibit, which I believe is No. 16, I offer in evidence a photostatic copy of the General Maximum Price Regulation, your Honor, which was issued on April 28, 1942.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 16 in evidence.

(The document referred to, marked Plaintiff's Exhibit 16, was received in evidence.)

Mr. Grady: As the next exhibit, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 184, which was issued on July 23, 1942.

Mr. Wyshak: What did that have to do with?

Mr. Grady: Sales by canners of Maine sardines.

Mr. Wyshak: I think that is irrelevant and immaterial. We are only concerned with tuna.

The Court: I would have to look at that.

Overruled. Of course, the court takes judicial notice of the regulations, but as I have stated to

you gentlemen the cases relating to them are so rare that it is helpful if counsel puts them in the record, the particular regulation, rather than just have us go to books and have us dig them out. Ultimately we take judicial notice of such regulations, and we have a complete set of the Federal Register.

The Clerk: Is that admitted, your Honor? [38]

The Court: It may be received.

The Clerk: That's 17 in evidence.

(The document referred to, marked Plaintiff's Exhibit 17, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 18, your Honor, I offer in evidence a photostatic copy of Regulation No. 209, which was effective August 31, 1942.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

Mr. Wyshak: Has to do with California sardines.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 18 in evidence.

(The document referred to, marked Plaintiff's Exhibit 18, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit 19, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation 237, which became effective October 15, 1942. Your Honor, this price regulation fixed the manner of computing the price at which wholesalers would sell their products.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: That's Plaintiff's 19 in evidence.

(The document referred to, marked Plaintiff's Exhibit 19, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 20, I offer in [39] evidence a photostatic copy of the Maximum Price Regulation No. 247, which was issued on October 24, 1942, dealing with domestic canned crab meat.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to, marked Plaintiff's Exhibit 20, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 21, your Honor, I offer in evidence a photostatic copy of the Maximum Price Regulation No. 252, which was issued on October 30, 1942.

Mr. Wyshak: Same objection. It has to do with vinegar-cured herring. I can't see what relevancy that has to do with this case.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 21 in evidence.

(The document referred to, marked Plaintiff's Exhibit 21, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 22, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 265, which was issued on November 9, 1942, dealing with sales by canners of salmon.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

The Clerk: That's Plaintiff's Exhibit 22 in evidence. [40]

(The document referred to, marked Plaintiff's Exhibit 22, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 23, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation No. 277, which was issued on November 28, 1942, dealing with sales by canners of mackerel.

Mr. Wyshak: Same objection, your Honor.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(The document referred to, marked Plaintiff's Exhibit 23, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 24, your Honor, I offer in evidence Maximum Price Regulation 299, which was issued on January 7, 1943, which fixed the prices for sales by canners of tuna, Bonita and yellowtail. That's the regulation which ultimately raised the price of our product from \$11 to \$12.

Mr. Wyshak: Your Honor, I will object to that on the grounds that it is incompetent and immaterial since we are only concerned with what the regulations were and what the ceiling price was which was in effect at the time the sales were made. This regulation is subsequent to those sales.

The Court: Overruled. But in view of the fact there is evidence to show there was some discussion as to a possible increase in price, and people acted upon the assurance that [41] such an increase was being considered, they bear on good faith.

The Clerk: Is this admitted then, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 24 in evidence.

(The document referred to, marked Plaintiff's Exhibit 24, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 25, your Honor, I offer in evidence a photostatic copy of Maximum Price Regulation 366, which was issued on April 13, 1943, and fixes the price of fresh tuna; that is, the raw tuna, manufacturer's raw product.

The Court: It may be received.

Mr. Wyshak: I object, your Honor, as irrelevant and immaterial.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit No. 25 in evidence.

(The document referred to, marked Plaintiff's Exhibit 25, was received in evidence.)

Mr. Grady: Your Honor, as Plaintiff's Exhibit No. 26, I offer in evidence three other documents which I think this court would take judicial notice; the first being a photostatic copy of a complaint filed in this court on June 3, 1943, entitled Prentice M. Brown, Administrator, Office of Price Administration vs. French Sardine Company, Inc., No. 2960-BH.

The Court: It may be received. [42]

The Clerk: Plaintiff's Exhibit 26 in evidence.

(The document referred to, marked Plaintiff's Exhibit 26, was received in evidence.)

[See Page 227.]

Mr. Grady: As Plaintiff's Exhibit No. 27, your

Honor, I offer in evidence a stipulation filed on the same day in that same cause.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 27, in evidence.

(The document referred to, marked Plaintiff's Exhibit 27, was received in evidence.)

[See page 229.]

Mr. Grady: And as Plaintiff's next exhibit I offer in evidence the judgment entered on that same day, a consent judgment entered that same day in this same cause.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 28 in evidence.

(The document referred to, marked Plaintiff's Exhibit 28, was received in evidence.)

[See page 230.]

Mr. Grady: As Plaintiff's Exhibit No. 29, your Honor, I offer in evidence a retained copy of Plaintiff's corporation income and declared valuation excess profits tax return, Form 1120, for the taxable year ending May 31, 1943.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 29 in evidence.

(The document referred to, marked Plaintiff's Exhibit 29, was received in evidence.)

Mr. Grady: As Plaintiff's Exhibit No. 30, your Honor, I offer in evidence a retained copy of Plaintiff's corporation excess profits tax return Form 1121, for the taxable year ended May 31, 1943.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 30 in evidence.

(The document referred to, marked Plaintiff's Exhibit 30, was received in evidence.)

Mr. Mackay: At this time, if your Honor please, we would like to call Mr. John Morris.

Take the witness stand, Mr. Morris.

JOHN V. MORRIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John V. Morris, M-o-r-r-i-s.

The Clerk: Thank you.

Direct Examination

By Mr. Mackay:

Q. What is your occupation, Mr. Morris?

A. Attorney—used to be.

Mr. Mackay: You are retired now?

The Witness: Well, I am ill now, and I haven't been able to work for some time. [44]

Q. By Mr. Mackay: Well, were you general counsel of the French Sardine Company?

A. Yes.

Q. From what date?

A. Oh, in my office in San Pedro I did some work for French Sardine on occasions for some years prior to May 1, 1937, and on May 1, 1937 I dissolved my partnership with Charles P. Johnson

(Testimony of John V. Morris.)

and went to the French Sardine Company and was employed continually from May 1, 1937.

The Court: Was that the Charles Johnson that became a municipal court judge?

The Witness: Yes, he became a municipal court judge, that is right.

The Court: All right. Go ahead.

Q. By Mr. Mackay: How long did you stay with them? How long were you general counsel of French Sardine Company? You got there in 1937.

A. Until about a year ago—may be.

Q. And you were general counsel during the year 1942? A. Yes.

Q. And at that time who was the president of the French Sardine Company?

A. Martin J. Bogdonovich.

Q. And was he a United States citizen?

A. He was a citizen of the United States. [45]

Q. Naturalized or native?

A. Naturalized.

Q. When the war broke out in 1942 do you know whether or not Mr. Bogdonovich took an active part in the war effort with respect to selling bonds?

A. He did immediately take a very active part and wanted to assist in every way possible; and contacted me and requested me what could be done, to tell him what could be done.

Q. Well, what did he do?

A. I suggested that he donate \$5,000 to the Navy Relief in Long Beach, and we contacted Capt. Kauf-

(Testimony of John V. Morris.)

man, I think the name was. He was in charge of that big center they had in Long Beach. And he in turn contacted the chaplain. I think the chaplain's name was Johnson. And we arranged to present Capt. Kaufman with this check for \$5,000, which I believed was turned over to the Navy chaplain for Navy relief.

Q. Was that right at the outbreak of the war?

A. Yes, that was the very beginning. Then Christmas of that year came along and I suggested that it would be nice if we sent some things to the boys at the base in San Pedro. And I think that I ordered—I know we sent them one great big case of cigarettes and sent them numerous articles as a Christmas present for them to this officer who was in charge of that base in San Pedro. [46]

Q. Now, what did Mr. Bogdonovich do with respect to the bond drive?

Mr. Wyshak: Your Honor, I think all of this is irrelevant and immaterial.

Mr. Mackay: This is preliminary.

The Court: Well, I don't—

The Witness: He worked hard on that and dropped dead during one of those bond speeches.

The Court: That is not material. I think what he did with respect to the general business is more interesting than his general attitude.

Mr. Mackay: Yes, sir.

Q. By Mr. Mackay: May I ask you, Mr. Morris, when Mr. Bogdonovich died?

A. When he died—what?

(Testimony of John V. Morris.)

Q. I beg your pardon?

A. What was the question concerning his death?

Q. I asked you if he is dead?

A. Yes, he is.

Q. When did he die?

A. I wouldn't remember the exact date.

Q. Do you know under what circumstances?

A. Yes.

Q. Please tell us.

A. Mr. Bogdonovich had arranged for a celebration and [47] for the appearance of a——

Mr. Wyshak: Your Honor, I think this is irrelevant and immaterial.

The Witness: ——prominent radio commentator at the Yugoslavia Club in a U. S. bond drive——

The Court: We don't need to go into that.

The Witness: Well, during the course of this bond selling speech he dropped dead.

Q. By Mr. Mackay: Now, Mr. Morris, you knew Mr. A. T. Williams, did you?

A. Very well.

Q. And what position did he hold with the French Sardine Company?

A. Salesmanager.

Q. And is he still alive, or is he dead?

A. No, he died.

Q. Now, as general counsel of the French Sardine Company, Mr. Morris, was it your duty to advise the company with respect to the Price Control Act? A. Yes.

Q. And did you so advise them? A. Yes.

(Testimony of John V. Morris.)

Q. Were you consulted with respect to the ceiling price that the French Sardine Company should use? A. Yes. [48]

Q. What advice did you give them at that particular time?

A. That I was of the opinion—Doc Williams, rather came up with the idea that the nearest canner was Van Camp's seafood company. We had always, apparently—Doc Williams and M. J. Bogdonovich looked with a great deal of respect upon Van Camp's seafood company, and occasionally undertook to compare ourselves with them. And apparently the first thing that came to their mind was in view of the fact we had no sales in March that we were comparable to Van Camp. I did not agree.

Q. You did not agree? A. Yes.

Q. Then did you so advise them?

A. Yes. But then sometime within a close period of time there, M. J. Bogdonovich came to me and explained to me—well, maybe that will come later. That's all.

You will have to forgive me. I am not too clear.

The Court: That's all right. Take your time. If you don't feel very well and want to stop, just let us know.

Mr. Mackay: Maybe if I stand a little closer, your Honor,—and I will speak a little louder.

The Court: I remember when you were active, Mr. Morris, and I am very sympathetic to anyone that is in ill health. That comes to all of us. [49]

The Witness: You remember when I was active

(Testimony of John V. Morris.)

in your court? You remember the case of Sandburg against Sandburg years ago?

The Court: That's right.

Q. By Mr. Mackay: Now, Mr. Morris, you said that you advised them that Van Camp's was not comparable. A. Yes.

Q. Did you give them your advice as to what you thought was comparable?

Mr. Wyshak: Your Honor, I object to this as immaterial and irrelevant. The ceiling has been established. The violation has been established; and there is no necessity for going into this at all.

The Court: If there isn't, it might as well be a judgment in your favor; and I can't do that until after I have heard the evidence.

You see, I have already familiarized myself enough with the case to see that there is a course of conduct right here verified by officials—in fact, one of the reasons I wanted to look at the letters, I do so much writing I have what you call a proof-reader's eye. I can glance at the page and take it in. That is why I can read so fast. And I notice in the early correspondence here the facts are brought to the attention that they are doing all this under the expectation, whether it is a promise or not, that an adjustment will be [50] made. And then in one of the first letters there—I think it is Exhibit 3; the three-page letter after the two telegrams; I think it is Exhibit 4—they notified the Office of Price Administration that while they are waiting for an adjustment, which they said they would

(Testimony of John V. Morris.)

probably make, they are putting a stamp on each invoice, which ties to the invoice which was introduced yesterday. So you have got a complete course of conduct, and it is always permissible to show intent by a course of conduct. So these are links in the chain to show at all times these people were acting under the impression that an adjustment would be made; that they notified their clients that if the adjustment isn't made there would be a refund. And if that isn't admissible, you might as well quit.

Mr. Wyshak: I don't deny, your Honor, that the intent prior to the time that these violations were made is relevant and should go in. What I am saying is they should not have a chance to relitigate here——

The Court: They are not relitigating at all. You have got your own man. Your own man said they practically made them a promise that they would reduce it. This is a case where you own top official—maybe you have someone who will contradict him—the top official said he felt at all times that this was one of those fortuitous situations; and the fact that the change came right after this bears upon this. And if that isn't permissible then we might as [51] well not litigate.

Mr. Wyshak: Well, your Honor, I don't question the bona fideness. What I mean is this: When they sold this tuna they knew what the ceiling was——

The Court: I know what you contend because I have read your memorandum, and I know what

(Testimony of John V. Morris.)

your contention is, and I will rule on your contention when I am through. And I am not through yet. I don't know what your evidence is going to be.

Mr. Mackay: Could you read that question?

(Question read.)

The Witness: Yes. I thought one of the other packers like Coast Fishing Company in Wilmington, which is a few miles from their plant in the same harbor, or West Gate Seafood in San Diego, due to their size and due to our size, and tuna packing, would be more comparable or nearer competitors of ours.

Q. By Mr. Mackay: Did you advise them that they could use the—sell their tuna to any other company? A. Yes.

Q. What company?

A. High Seas Tuna Packing Company.

Q. Will you please tell the court why you advised them on that?

A. Because I was informed by the manager of that company, Mr. Nielsen, who was on the stand yesterday, that [52] they had a price ceiling of \$15 a case of 48 fancy, light-meat tuna, and I understood that that ceiling was in effect for about a month after April 28, 1942, and then that subsequently it was reduced by OPA to \$14, and that they had an established \$14 ceiling over a period of time, which was \$3 more than the ceiling that they insisted on adopting from Van Camp's.

Q. Now, who controlled the High Seas?

A. High Seas Tuna Packing Company was in-

(Testimony of John V. Morris.)

corporated by me for M. J. Bogdonovich and some others in July of 1941; and at that time I asked for the issuance, I think, of about \$865,000 worth of stock to the Fishermen's Tuna Packing Company, I think it was called, in San Diego, which became High Seas later; and I think \$47,000 worth of stock to M. J. Bogdonovich. And then there was further negotiations being carried on by M. J. Bogdonovich towards acquiring more of the stock of the new corporation that succeeded the Fishermen's Tuna Packing—the High Seas Tuna Packing Company, and that in June he did acquire, or had committed 152 shares. And then more shares, as time went on, were acquired by him—exactly how much, I do not know. And this gave Mr. Bogdonovich personally approximately about a 40 per cent, 42 per cent, or somewheres around there in the time that is involved here, interest in High Seas Tuna Packing Company.

And I heard Nielsen tell what ceiling prices he had, and [53] as I understood he got them from some local sales that he had made during the month of March in the San Diego area. And I suggested to Mr. Bogdonovich, in view of the fact they thought that their ceiling was \$11, and that didn't give them much margin, and with the price of fish continually going up, they wouldn't know where the devil they were at and what they could sell for, that it might be advisable for him as the principal owner of the French Sardine and a substantial owner of High Seas Packing Company, to channel

(Testimony of John V. Morris.)

his fish and to channel the Fishermen's Tuna Packing Company fish, which he was sales agent, or which he sold to French Sardine Company, rather than permit them to handle it all, and let Nielsen sell that fish to the Fishermen's Tuna Packing for their ceiling, which would give him \$3, and would still give him more money to his transaction for French Sardine Company and French Sardine Company instead of being on a ragged edge would have a 10 per cent brokerage commission from the fish sold for High Seas Tuna Packing Company. And I thought that was a good deal to keep him balanced.

Q. What did he say about that?

A. Oh, he wouldn't hear of it. And he was sort of a temperamental man, and I am inclined to think he blew up at me for such a suggestion.

Q. Did he tell you why he didn't want to do it?

A. That he didn't want to profiteer, that he had his [54] brokers with whom he had established reputations over a period of years, and that he wanted to deal with them, and that he wanted to handle his fish for French Sardine Company. Even if he made less money he was happy if he could do that.

Q. Now, Mr. Morris, do you know whether or not there was a voting trust on the High Seas stock executed?

A. Yes, there was.

Q. Did you prepare it?

A. Yes, I prepared a draft of the voting trust for High Seas Tuna Packing Company. And it was practically a draft of the voting trust as contained

(Testimony of John V. Morris.)

in the form part of Ballantine on California Corporations; altered by me to conform with the situation of the High Seas Tuna Packing Company. This draft I took to San Diego and presented to Jerry Driscoll of Drake, Carey, Ames & Driscoll, who was the attorney for the Fishermen's Tuna Packing Company, and later became attorney for High Seas Tuna Packing Company.

Mr. Wyshak: Your Honor, may I have a continuing objection to this on the grounds that it is irrelevant and immaterial, subject to a motion to strike?

The Court: All right.

The Witness: And this voting trust was later executed.

Q. By Mr. Mackay: I hand you a document here which is headed "Voting Trust." I ask you to please examine this and tell us whether or not that is a copy—— [55]

A. I have already examined this and I recognize it from Mr. Driscoll's signature. And this is the voting trust we settled upon based upon my draft.

Mr. Mackay: I would like to have this marked for identification.

The Court: It may be received.

The Clerk: Is this being offered, or merely to be marked?

Mr. Mackay: Well, I may as well offer it in evidence.

Mr. Wyshak: I object, your Honor, on the grounds that it is irrelevant and immaterial.

(Testimony of John V. Morris.)

The Court: Received.

The Clerk: Plaintiff's Exhibit 31 in evidence.

(The document referred to, marked Plaintiff's Exhibit 31, was received in evidence.)

Q. By Mr. Mackay: Now, Mr. Morris, as general counsel of the French Sardine Company in 1942, and particularly the late spring and summer, and during the latter part of the year or during the rest of the year, did you have conferences with Mr. Bogdonovich and Mr. Williams with respect to this attempt of the French Sardine Company to negotiate with the Government for a higher ceiling than \$11?

A. Well, I would like to explain our method of operation in the French Sardine Company.

Mr. Wyshak: That can be answered yes or no, your Honor. [56]

The Witness: If I could. And then from that——

The Court: Yes. Well, you may answer yes or no, and then you may explain your answer.

Mr. Mackay: Then you go ahead.

The Witness: I have lost the question.

Mr. Mackay: Well, I will reframe it.

The Witness: No. It may have been framed properly; just that I slip sometimes.

Mr. Mackay: Would you read it, then?

(Question read.)

The Witness: I would say almost daily conferences, as we ran a sort of small operation in respect to our business. In other words, Mr. Bogdonovich, Mr. Williams, Mr. Jerry Shear and one

(Testimony of John V. Morris.)

or two of the Kravathivich brothers, myself and Joe Bogdonovich would sit around an old desk in a so-called sales office and Doc Williams would read all of the correspondence that he judged important every morning when M. J. Bogdonovich would come to the cannery. And then Doc Williams would be advised as to how he was to answer because he handled practically all of the—he did handle all the important correspondence. And then we would discuss the various things that came up. And one of the things that was under fairly constant discussion was this so-called price ceiling. And Doc's contacts with Triggs, his phone calls with Triggs, his correspondence with Triggs—as I remember it, [58] Doc stating as to what Triggs said to him, especially with respect to the price ceiling, and that we thought—then that Doc thought that it was all right to go ahead and base our prices at \$12.

Q. By Mr. Mackay: May I ask you this, Mr. Morris: Were you consulted by the management of the French Sardine Company with respect to those conferences?

A. At those conferences I was constantly, you might say, consulted, and I was supposed to speak up if something needed correction within my scope of knowledge.

Q. May I ask you if the invoices which were sent out I think sometime in September—

A. Yes.

Q. Which contained words to this effect that there would be a refund of a dollar a case in the

(Testimony of John V. Morris.)

event that OPA had not granted the requested increase——

A. Yes.

Q. ——was that sent out at your advice?

A. It was brought out at one of these so-called daily meetings, and I think that Doc Williams drew the provision and asked me if I thought it was proper, or if I had any idea about changing it.

Q. What was your advice?

A. My advice, that I thought that it was perfectly proper and I based that upon many reasons.

Q. What are they?

A. We were always reading about pronouncements. I have in mind now one pronouncement that was brought back to my attention in the correspondence that I think was just introduced in evidence, a statement to, I believe, Doc Williams and these other people, and they were gathered in Washington at a meeting by Secretary Wickers to the respect that these regulations were hastily drawn; that they were recognized to be imperfect; that they were subject to correction.

Mr. Wyshak: I think the question has been answered. There is no question pending.

The Court: Go ahead. He may give an explanation.

The Witness: And that there would be many inequalities, or words to that effect, that many canners would be hurt, that these would be eliminated or worked out as time went on. And that we could not let these inequalities stand—or these regulations stand in the way of production—which led

(Testimony of John V. Morris.)

me to believe that OPA would correct anything that was wrong, because that was the pronouncement from there.

Then also I think there is another letter in that correspondence which was in line with Doc Williams telling us that Triggs was telling him that there was a conference between officials in Washington——

Mr. Wyshak: These letters speak for themselves. [59]

The Court: Well, that is all right. We will go to the letters in greater detail.

The Witness: This is what motivated me, your Honor.

The Court: All right. You want us to stop for a minute?

Mr. Mackay: Yes.

The Court: Let us stop for a minute. Go ahead, you may step down.

I want to make an observation here for the record. One of the advantages one has in a case of this character is having gone through this type of period of litigation. So I am going to call attention to an opinion of mine dealing with the problem which will show how constantly the procedures and the Government were disputing the question as to what base shall be used as a foundation for the establishment of a ceiling, what comparable product should be brought in.

The case I refer to is Boyles, Price Administrator vs. Wilson & Company. It is reported at 63 Fd.

(Testimony of John V. Morris.)

Sup. 687. The Price Administrator had sued Wilson & Company, one of the packers, for the sum of \$79,117.68, in the main sum, plus the trebling of damages, plus other relief. The basis of their contention was that Wilson & Company had sold 23 cents for an all-vegetable margarin in the Los Angeles area. The entire contention was that the base they had chosen was the wrong base. The Government contended that they should have chosen a margarin which was in the market at the time. [60] This margarin that they were selling was an all-vegetable margarin. It was a new product. And the margarin which had been sold prior to that time was made of, chiefly of animal fats. The Government said, "That is the product by which you should go." And I said no. And the Government lost. I do not know whether they appealed. If they appealed they lost, too.

And this is the argument: The Administrator's chief contention that the price was excessive is grounded on the proposition that the all-vegetable oleomargarin which the defendant sold in 1944 was the same or an identical product as an animal and vegetable margarin, which the defendant manufactured at Los Angeles and sold at the lower price in March 1942, the base period chosen for the fixing of the price; and which contained 70 per cent of the animal fat; GMPR 2. That's the regulation.

And then I said I believe the court must take judicial notice of the fact that in the matter of evidence an all-vegetable product cannot be compared

(Testimony of John V. Morris.)

with a partly animal and partly vegetable product, and with the animal fats amounting to 70 per cent; and the evidence in the record shows the difference between the two. After all, to say that both are edible doesn't solve the question. Nor is the question solved by attempting to show that they are as palatable to some people. The truth of the matter is that an edible product [61] like oleomargarin made chiefly of animal fat is not the same as or similar to GMPR 2 (a) (2); one made entirely of vegetable ingredients. The fact that both are used as spread and may be a poor man's substitute for butter is of little consequence. It is as unrealistic to claim identity for them as it would be to claim identity for Crisco or other all-vegetable shortenings and shortenings composed entirely or partly of lard merely because they are both used for the same purpose of shortening.

“* * * The Administrator's chief contention that the price was excessive is grounded on the proposition that the all-vegetable oleomargarine, which the defendant sold in 1944, was the same or an identical product as an animal and vegetable margarine, which the defendant manufactured at Los Angeles and sold at a lower price in March 1942, the base period chosen for the fixing of the price, and which contained 70 per cent of animal fat (GMPR. 2). I believe the court must take judicial notice of the fact that, in the matter of edibles, an all-vegetable product cannot be compared with a partly animal and partly vegetable product in which the animal fats

(Testimony of John V. Morris.)

amount to 70 per cent. And the evidence in the record shows the differences between the two. After all, to say that both are edible does not solve the question. Nor is the question solved by attempting to [62] show that they are as palatable to some people. The truth of the matter is that an edible product, like oleomargarine made chiefly of animal fat, is not the same as, or similar to (GMPR 2(a)(2), one made entirely of vegetable ingredients. The fact that both are used as spreads and may be a poor-man's substitute for butter is of little consequence. It is as unrealistic to claim identity for them as it would be to claim identity for Crisco or other all-vegetable shortenings and shortenings composed entirely or partially of lard, merely because they are both used for the same purpose—shortening: I am quite certain that a physician or dietitian who placed a patient on an all-vegetable diet forbidding him to eat animal fats would be shocked if he were informed by the patient that instead of an all-vegetable margarine, he had chosen to eat a margarine consisting of 70 per cent animal fats, because they were both the same. This is not a case where a processor, by increasing certain ingredients, changes a blend, such as occurred in the instance suggested by the Administrator—the coffee blend (OPA Service, p. 11: 1024). The Administrator, himself, has ruled that the addition of Vitamin A to margarine makes it a new commodity, distinct from non-vitamin margarine (Report 286, 42, 418.11). An all-vegetable [63] product manufactured in lieu of a combination

(Testimony of John V. Morris.)

animal-vegetable product is a new product in law and in fact. And as GMPR 1499 does not contain a definition of 'same commodity,' the matter becomes one for judicial interpretation.

"Interpretations by the Administrator are not given the force of law. Only regulations have such force. And no other administrative regulation has been called to my attention, which would deny to such product its quality as new.

"The contention to the contrary—absent a binding regulation—calls for rejection on the basis of the realistic facts already referred to, even if we take into consideration the definition of 'similar commodities' contained in note to GMPR 1499.2."

I am calling to your attention this fact in order to emphasize that there was a constant bickering going on back and forth between the Administrator and processor, not the little guys, but the big guys—Wilson & Company, one of the big four, or big six packers—as to whether there was violation or not. And we were called upon at all times to interpret whether a proper base had been used.

So in view of that fact it is quite evident that we have a right in order to determine whether this was a fine imposed upon a willful violator, so that it is not deductible, or if it is one of those fortuitous things resulting from an [64] honest difference of opinion as to whether a proper charge was made.

And I could give you more. I have written five or six—I have forgotten about them. I had to go through my book to remember the title of them be-

(Testimony of John V. Morris.)

cause I wrote so many of them. In Jung, to show you the problems we had imposed, a very interesting problem was involved. It involved the wholesale market which operates in Los Angeles; and the wholesale market which operates from the hours of about 11:00 o'clock at night until 4:00 o'clock in the morning; a place where the retailer goes and buys his product. You go and see a box of oranges and you buy 50 boxes. And the owner of the stand transports by truck, by hand truck to the vehicle of the buyer. The vehicle of the buyer is located about three or four blocks from the place. A very interesting question arose.

The OPA regulation said that they were entitled, that the wholesaler of produce, of oranges,—no, I think it was——

Get me the case. It was a very interesting case to show you the problems that arose. This wasn't as easy as those who haven't gone through the process of adjudicating these matters. They think now in retrospect.

It is 57 Fd. Supp. 701, Bowles vs. Jung, a Chinese. I think it involved tangerines. And they provided a different price for tangerines if the tangerines were delivered. [65] So the OPA arbitrarily said that delivery meant delivery at a distance, that delivery three blocks away wasn't delivery at all. So they sued. And let me see. Oh, they always sued in millions, you know. Let us see what they sued for. It is a very lengthy opinion. This is just a memorandum.

(Testimony of John V. Morris.)

Incidentally, Mr. Breitenbach appeared in that case. And by that time he had left. But his assistant who was in the case, William U. Handy and Miss Arlene Martin are still in the Government service, and they were with him.

There were several problems involving the case, and one of them was whether that was transportation. It was a long case. The judgment was for Bowles on other matters, but against him on that contention.

This is from *Bowles vs. Jung*, 57 Fd. Supp. 701. I am reading from page 706.

"The Administrator challenges the mark-ups in this and the other transaction, upon the ground that the defendant charged for deliveries which were made within a short distance, not exceeding, at the most several blocks within the same area. The Administrator urges that his office has interpreted 'delivery' not to include deliveries within the same market. But, the regulation does not define 'delivery.' Therefore, the word must be given its ordinary legal sense. Under the law of sales, title to the goods passes at [66] once to the buyer if an agreement is executed.

"If the seller is required to deliver the goods at a place designated by the buyer, title does not pass until delivery has been made.

"The California Uniform Sales Law provides:

" 'If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transporta-

(Testimony of John V. Morris.)

tion to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.'

"This is especially true in sales between merchants which contain F.O.B. provisions. Title, in such instances, does not pass until delivery at the point of shipment. The goods are at the risk of the seller until they are put on board.

"In the meantime, full responsibility rests upon the seller. If the goods are destroyed in transit, the sale is not completed and the loss is the seller's. And this principle applies whether the delivery is made two blocks away by an employee of the produce company who carries a lug of tangerines on his shoulders, or several lugs on a hand-truck or dolly which he wheels through the market, or whether he [67] delivers it by motor truck at a place designated by the buyer.

"The Administrator seems to think that no delivery is a delivery unless it is actually made at some great distance, at the buyer's place of business. Perhaps if the Administrator had so defined delivery, we might be compelled to adopt this interpretation, although it would do violence to the law of sales. For such a definition would force upon the seller the responsibility for the loss of the goods, the risk resulting from the use of his equipment by his own employees, including injuries to these employees and others, and, at the same time,

(Testimony of John V. Morris.)

would deny him the right to make a charge for the delivery which has these hazards.

“But the Administrator has not done so. My duty, therefore, as a judge, is to give to the word ‘delivery’ a meaning which conforms to the accepted legal principles. It is well to bear in mind the warning of Mr. Justice Douglas that, in carrying out the objects of the statute under which the regulation was written to prevent inflation, the Administrator ‘does not carry the sole burden.’

“The courts have a like responsibility, which must be exercised in the light of recognized legal [68] principles. Hence we cannot give to the word ‘delivery’ any other meaning than that which it has under known legal norms.

“The injustice of a contrary interpretation in this case is apparent.

“The market in which these men did business sprawls over many, many streets in the heart of the industrial district of Los Angeles, covering miles of territory. In the early morning, when the sales are made, the market is a conglomeration of piled up packing boxes, lugs and all sorts of containers filled with all kinds of fruits and vegetables. The floors are strewn with rejected fruits and vegetables. Water is running in all directions. The seller’s employee who carries or trucks a load of fruit through the market to the place designated by the buyer, runs the risk of slipping, damaging the fruit and injuring himself. And yet, we would, under the interpretation of the Administrator, make the seller

(Testimony of John V. Morris.)

assume all these burdens while denying him the right to charge for the risk so incurred.

“But the deliveries were not all of manual character. The evidence shows that, in many instances, deliveries were made on motor trucks of the buyers located several blocks away. This was especially true [69] in the case of chain stores which bought large quantities for sale at their individual stores. The transportation manager of one of these chains designated his company’s truck standing several blocks away from the defendant’s place of business as the place of delivery. The defendant’s motor truck, driven by one of his employees, had to be used in transporting the goods to the place. In transit, the responsibility not only for the safety of the merchandise, but also for any accident which might result in damage to the seller’s truck or to the property of others or injury to the driver or to any other persons was on the defendant. And the risk taken was just as great as if the delivery had been made twenty blocks away, at a store designated by the buyer.

“I conclude, therefore, that in sales where deliveries, in the sense here indicated, were made, the defendant had the right to the additional mark-up.”

I am pointing to the fact that we almost have to go into metaphysics in order to try to put sense into some of these regulations. So that it is quite important now when we find that the Government insists that some \$90,000 that was paid cannot be recovered because they are foreclosed by the fact

(Testimony of John V. Morris.)

that they were paid. It is very important to go into the entire background to see whether there was a willful violation [70] or whether it was one of those fortuitous things that arose from the various conflicts of interpretation. And here are a couple of cases which indicate the type of conflicts there were, and I could give you a half dozen more but I won't take the time.

All right. We will now take the recess.

(Short recess.)

The Court: All right, gentlemen. Let's continue with the testimony.

Mr. Mackay: You may cross examine, Mr. Wyshak.

Cross Examination

By Mr. Wyshak:

Q. At the time you were asked by the representatives of the French Sardine Company as to the propriety of their making a notation on each invoice regarding their charging an amount in excess of the ceiling, were you acquainted with the OPA rules and regulations?

A. I was acquainted with some of the OPA rules and regulations. I think at the time we took a service that was called Tax Research Service, or some darn thing that came out and told you what you could do and what you couldn't do, and what the Government had done on war production, OPA and taxes and no end of things. That came out every week, I think.

(Testimony of John V. Morris.)

Q. Did you make a study of it before giving them your conclusion? [71]

A. Well, no. I think the thing was all a gradual growth of trying to keep up with all the various things that happened, governmental and otherwise; and it was upon that knowledge that I had accumulated through various sources that I based my opinion—and I am as certain as I am sitting here that \$11 a case, regardless of how the darn thing got on record, was never the price ceiling of French Sardine Company. And I can explain and give you my substantial reasons which I believe are actual physical facts of comparison that haven't been gone into either by the management of French Sardine or the OPA; except all they did——

Mr. Wyshak: I think you have answered the question.

The Witness: ——all they did was substantiated Van Camp's \$11.

The Court: Don't get worked up, Mr. Morris, just talk calmly. Remember you are a witness and not an attorney.

The Witness: That is my defect, your Honor. I get lost. I can't help it. I apologize, your Honor.

The Court: All right.

Q. By Mr. Wyshak: But at that time the representatives of the French Sardine Company did feel \$11 was their ceiling?

The Court: Did what?

The Witness: Did feel that \$11 was their ceiling.

(Testimony of John V. Morris.)

Mr. Wyshak: Felt that \$11 was their ceiling price, didn't they? [72]

The Court: Did they feel that it was, or was that the price fixed? They didn't feel it was, because they contended it was more.

Go ahead. He is giving you a chance now to express an opinion. Go ahead.

Q. By Mr. Wyshak: Did they or didn't they?

A. Some did and some didn't. I didn't.

Q. But those who originated the idea of putting the notation on the invoices at the higher price did feel that \$11 was the ceiling?

The Court: What was the price of the invoices? I haven't seen the invoices since yesterday.

Mr. Wyshak: Your Honor, it was a dollar over what the \$11 was. It hasn't been put in evidence.

The Court: Go ahead. That is permissible.

Mr. Grady: Your Honor, I have a copy of the invoice that I would like to introduce in evidence now so your Honor could have the——

The Court: Wasn't one introduced yesterday?

Mr. Grady: There was merely a statement, your Honor.

The Court: Well, let's have it. I was under the impression that went in yesterday.

Mr. Grady: This is just one typical example.

The Court: All right.

The Witness: Do you want me to tell you why?

The Court: Answer the question, and then you may explain it.

The Clerk: Plaintiff's Exhibit No. 32 in evidence.

(Testimony of John V. Morris.)

(The document referred to, marked Plaintiff's Exhibit 32, was received in evidence.)

[See page 233.]

The Witness: I lost the darn thing. Can you repeat the question?

Q. By Mr. Wyshak: I think you stated that Mr. Williams was the one who originated this idea of putting the notation on the invoice, is that correct?

A. That was my impression as a result of one of those morning conferences.

Q. And he felt that \$11 a case was the ceiling price, did he not?

A. He was the one that came up with Van Camp's \$11.

Q. And if \$11 were the ceiling price, as a result of your study and analysis of the rules and regulations, you realized, did you not, that there would be a violation?

A. No. And I still contend there wasn't any violation.

Q. I say on the assumption that \$11 was the ceiling price.

A. That wasn't the ceiling price, in my opinion.

Q. On the assumption that \$11 was the ceiling price, billing it at \$12 with that notation on the invoice, would be a violation, would it not? [74]

A. If the ceiling price was \$11, actually, properly arrived at, in my opinion, they asked \$12, then I would say that would be a violation, yes.

The Court: This charge says:

(Testimony of John V. Morris.)

“Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1 per case less on 48/1½s and \$2 per case less on 48/1s, and will refund you accordingly.”

Now, under this it is conceivable that one of the buyers could have declined to do so by saying, “We’ll pay you the ceiling and then if you get the additional one and it makes it retroactive, we will pay you back.” And you would have accepted?

The Witness: That is right, we would. That was the intention. The intention was to give them their dollar back if somebody hollered too much from the Government.

Q. By Mr. Wyshak: French Sardine had to file with the OPA a schedule as to what its ceiling price was on each item, didn’t they?

A. I didn’t quite hear that.

Mr. Wyshak: Would you read the question, please?

(Question read.) [75]

The Witness: French Sardine Company did not have a ceiling price so Doc Williams tried to determine if he could correctly, with what Van Camp’s ceiling price was——

Mr. Wyshak: Would you please reread the question, Mr. Reporter? I don’t believe you caught the question, Mr. Morris.

(Testimony of John V. Morris.)

The Witness: I may not have.

(Question read.)

The Witness: I actually don't know. I didn't see what they filed.

Q. By Mr. Wyshak: Well, I asked, do you know whether they had to?

A. No, I don't know. I imagine they did, but I don't know. The regulations are so far off all I can have is the general impressions that I carry over from that time, plus the things that I might have been vehement on that didn't impress and inculcate themselves upon my mind.

Q. They would have filed such a schedule, wouldn't they, if they had to?

A. Well, the regulation will say so, and what the regulation provided, I presume was filed. We always try to abide by those regulations.

Q. If one were filed?

A. In the regular course of business that would have been the procedure.

Q. If one were filed? [76] A. Yes.

Q. Would it have had the \$11 figure or the one that you had in mind?

A. The one that they would have filed would have had their mistaken ceiling on, which is the \$11 ceiling; that being Doc Williams' idea that we were as big and comparable to Van Camp's.

Mr. Wyshak: No further questions, your Honor.

The Court: Any redirect?

Mr. Mackay: That's all.

The Court: That is all. Step down.

(Witness excused.)

Mr. Grady: Mr. John Tripps, please.

JOHN P. TRIPPS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John P. Tripps, T-r-i-p-p-s.

Direct Examination

By Mr. Grady:

Q. Would you please state what your present office is with the Star-Kist Foods, Inc.?

A. Vice-president, secretary and treasurer.

Q. And that's formerly the French Sardine Company?

A. Formerly French Sardine of California.

Q. You also held those same offices with the French Sardine Company of California?

A. Yes.

Q. And for how long have you been treasurer of the French Sardine Company of California?

A. 20 years, plus.

Q. Are you also an officer of the High Seas Tuna Company?

A. I am. I am vice-president of High Seas.

Q. I hand you a schedule and ask if you can identify it?

A. This schedule is an analysis of our total sales of the period of May 1, 1942, through June 1947.

Q. Does it show other items?

(Testimony of John P. Tripps.)

A. It also shows the cash expenditures during the year 1942 by months, and average weekly and monthly turnover.

Q. Was this schedule prepared under your supervision? A. It was.

Q. From the books and records of the French Sardine Company? A. Yes, sir.

Mr. Grady: I offer this schedule in evidence, your Honor, as Plaintiff's Exhibit No. 33. A copy has already been furnished two or three days ago for counsel.

Mr. Wyshak: Your Honor, I am going to object to that on [78] the ground that no foundation has been laid as to who prepared it; and irrelevant and immaterial.

The Court: Well, I think before you allow a summary you have got to show how it was made. You have got to show whether it was made under his direction or whether in his opinion it correctly represents the sales as reflected in the original books.

Mr. Grady: Your Honor, may I inquire further then?

Q. By Mr. Grady: Mr. Tripps, who prepared that schedule under your direction?

A. Roy Kelly.

Q. Does it in your opinion correctly reflect the original books and records of the company; a summary of those books and records?

A. It definitely does.

The Court: All right. It may be received.

(Testimony of John P. Tripps.)

The Clerk: Plaintiff's Exhibit No. 33 in evidence.

(The document referred to, marked Plaintiff's Exhibit 33, was received in evidence.)

The Court: The original books are available to the Government if they want to check?

Mr. Mackay: Yes, indeed.

The Witness: Yes, sir.

The Court: All right.

Incidentally, these are the figures that were used in [79] computing the income tax in the report which is in as an exhibit?

The Witness: Yes, sir.

Q. By Mr. Grady: I hand you another document, Mr. Tripps, and ask you to identify that.

A. This is an analysis of sales and maximum ceiling prices covering tuna sold by the High Seas Tuna Packing Company from May 1942 through January 1943.

Q. And was that document prepared under your direction? A. Yes, sir, it was.

Q. And does it correctly reflect the books, in your opinion; correctly reflect the original books and records of that company? A. Yes, sir.

Mr. Grady: I now offer this document in evidence, your Honor.

Mr. Wyshak: Same objection, your Honor.

The Court: Overruled.

The Clerk: Plaintiff's Exhibit No. 34 in evidence.

(Testimony of John P. Tripps.)

(The document referred to, marked Plaintiff's Exhibit 34, was received in evidence.)

The Court: The same is true as to the other? It is a correct summary, and the books are available, and it is the basis of the figures on which the income tax was computed as shown by a copy of the income tax return filed here? [80]

The Witness: That is correct, your Honor.

Q. By Mr. Grady: Mr. Tripps, I now hand you a document, a piece of cardboard with several documents on it, and I ask if you can identify that, please?

A. Yes. These are our usual bulletins that we mail to all of our brokers representing us.

Q. Would you state how many and the dates of the various mimeographs that are attached there so they will be properly identified?

A. August 20, 1942, two pages; September 24th, two pages; September 24th, another one; October 20th, 1942; December 1, 1942; January 4, 1943.

Q. Is that the original record from the files of your office?

A. Yes, sir, it is. We keep these in a large volume book.

Q. And can you tell the court the circulation that those mimeographs had—to whom are they sent?

A. Sent to our brokers, of which there are approximately 100 to 125 brokers.

Mr. Grady: I now offer this document in evidence. I don't know whether you would like to

(Testimony of John P. Tripps.)

have each separate mimeographed marked a separate exhibit number or——

The Court: Just circulars sent with the same subject. I think they can be put in as one exhibit. The reason I wanted [81] the others separately was because each record was different, and the ones that dealt with the same subject, they had an individual relationship.

Mr. Grady: Well, your Honor, these do each deal with a separate subject. One deals with mackerel and another one with sardines,——

The Court: I have no objection to that. If you have to pick one out, we can use a number for the subdivisions.

The Clerk: Is this admitted, your Honor?

Mr. Wyshak: Your Honor, I am going to object as to those portions that deal with fish other than tuna, and as to those that are dated subsequent to the time that——

The Court: Well, I think the court will disregard any matter in there except those that relate to tuna.

Mr. Wyshak: And also those memoranda which are dated after the date of the violation here.

The Court: Well, I would have to pick those out. I don't know which are dated after the violation.

Mr. Wyshak: Well, I don't know how to open this thing. I don't want to tear it apart.

Mr. Grady: Well, we didn't want to separate them, your Honor.

(Testimony of John P. Tripps.)

The Court: Well, I will disregard those after the date of the judgment.

Mr. Wyshak: No. I meant after the date of the sales [82] of tuna at the over-ceiling price, your Honor.

The Court: What is the last date?

Mr. Wyshak: I presume it would be the date the new regulation was promulgated early in January 1943.

Mr. Grady: We have no objection to your disregarding any after that, your Honor, because there are none after that date.

The Clerk: Is this admitted?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit No. 35 in evidence.

(The document referred to, marked Plaintiff's Exhibit 35, was received in evidence.)

[See page 234.]

Q. By Mr. Grady: Mr. Tripps, have you examined the books and records of the French Sardine Company in an effort to determine what the ceiling price you had was on California sardines prior to August 31, 1942? A. Yes, sir, I have.

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: Overruled.

Mr. Grady: Your Honor, so that you might be able to follow this particular testimony, I refer you to Exhibit No. 18, which is price regulation 209, and in particular the fourth page thereof where

(Testimony of John P. Tripps.)

the new ceiling prices are listed. And I am going to ask the witness what the French Sardine [83] Company's price was on each of these items prior to the issuance of this new ceiling price.

The Court: All right.

Q. By Mr. Grady: Now, will you state your price on No. 1 ovals standard pack Tomato Sauce, mustard?

Mr. Wyshak: May I have a continuing objection, your Honor,——

The Court: Yes.

Mr. Wyshak: ——on the grounds that it is irrelevant and immaterial, and subject to a motion to strike?

The Court: All right. Overruled.

The Witness: You want that before the ceiling——

Q. By Mr. Grady: Before August 31, 1942, when this regulation came out.

A. \$4.10.

Q. Would you state what your price was on No. 1 ovals standard pack Natural? A. \$4.00.

Q. On No. 1 talls standard pack, Tomato Sauce, mustard? A. \$3.40.

Q. No. 1 talls standard pack Natural?

A. \$3.15.

Q. 8 oz. standard pack Tomato Sauce?

A. \$3.90.

Q. 8 oz. standard pack Natural? [84]

A. \$3.90.

Q. 5 oz. standard pack Tomato Sauce?

(Testimony of John P. Tripps.)

A. \$3.65.

Q. On 5 oz. standard pack Natural?

A. Also \$3.65.

Q. Now, have you computed what the average increase was in the prices fixed on August 31, 1942?

A. Yes, I have. It shows here from 12 per cent to as high as 35 per cent. Did you want it by specific items, or——

Q. Why don't you read the specific items in the order that I have given them to you?

Mr. Wyshak: May I inquire as to what the witness is testifying from?

Mr. Grady: You may.

Mr. Wyshak: What is that document?

The Witness: This is a memorandum that I made for my books.

Mr. Wyshak: You prepared it yourself?

The Witness: I have prepared most of it.

Mr. Wyshak: Which portions did you prepare?

The Witness: The prices, the calculations.

The Court: All right. Go ahead.

Q. By Mr. Grady: Would you state the percentage increase in the order that I have given you, starting with No. 1 oval pack Tomato Sauce mustard and ending with 5 oz. standard pack [85] natural?

A. 12.7; oval natural 13 per cent; talls tomato mustard 16.2; talls natural 14.3; 96 8 oz. tomato, 35 per cent; 96 8 oz. natural, 28.2; 100 5 oz. tomato, 27; 100 5 oz. natural, 20.5; or an average of 20.9 per cent.

(Testimony of John P. Tripps.)

Q. In some of those you indicated——

The Court: Is that the maximum allowed, or is that what you took?

The Witness: This is our ceiling price—the ceiling price allowed us over our March ceiling price.

The Court: I see.

The Witness: That was an increase.

Q. By Mr. Grady: You mentioned a figure—100 5 oz. I assume the 100 means how many cans in a case? A. That is right.

Q. And the same for 96 8 oz.?

A. Correct.

Q. Can you tell us from the books and records of your company what prices French Sardine paid for raw tuna per ton during the season 1941?

A. Yes, sir.

Mr. Wyshak: That is objected to as irrelevant and immaterial.

The Court: There we are getting into the question of reasonableness of the price, which is no concern of ours. [86] I think these discussions and negotiations, the things that were told the Administrator, the things they talked about, will show that there was a dispute, a reasonable basis and a reasonable basis for dispute. We can't go behind that, because otherwise we are going far afield.

Mr. Grady: I understand, your Honor, some statements were made in those letters determining these prices, and I merely wanted to verify them for your Honor, but——

The Court: I don't think we ought to, unless the

(Testimony of John P. Tripps.)

Government should dispute them by any testimony they offer.

Mr. Grady: All right.

The Court: If they do that, then you may go into the question of the correctness of the cost as referred to in the letters. You don't have to support the statement of your letters.

Mr. Grady: I have no further questions.

The Court: Any questions?

Mr. Wyshak: I have, your Honor.

Cross Examination

By Mr. Wyshak:

Q. With respect to the 97,215 cases of tuna that were sold in the period September 1942 to January 1943, can you give us a breakdown of approximately how many cases were sold each month in that period?

A. Yes, we can. I can't do it right offhand, now. [87] I am not prepared. It can be given to you.

Q. Well, would you say that most of it was sold immediately after it was decided to increase your price, with the notation on each invoice during September and October?

A. I think Roy can get some figures for me right there.

The Court: Who was that?

The Witness: Mr. Kelly is right here.

The Court: Well, that information is available. Are you going to put him on?

(Testimony of John P. Tripps.)

Mr. Grady: No, we didn't intend to, your Honor.

The Court: Well, if he has the facts available-- what is he, an accountant?

The Witness: He is the comptroller.

The Court: Well, if the information is available, I have no objection to putting him on and giving it to him when you are finished with this witness.

All right. Step down.

Mr. Grady: I have one further question from this witness.

The Court: Go ahead.

Redirect Examination

By Mr. Grady:

Q. Mr. Tripps, I notice from Exhibit No. 33 that the average weekly cash expenditures during the last three months, October through December, is substantially higher than the average weekly cash expenditures for the entire year. Can [88] you tell us why?

A. Yes, sir. That is our main season.

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: What was that? Read the question.

Mr. Grady: Your Honor, the average cash expenditures for the last three months of the year, which followed immediately our sending these invoices out, are substantially higher than the average for the entire year, and there is a significant reason for it.

(Testimony of John P. Tripps.)

The Court: I don't think it was necessary. I will sustain the objection.

All right. You want that information, Mr. Wyshak?

Mr. Wyshak: Yes, I would.

Mr. Grady: We will make him available, your Honor.

We have no further questions of this witness.

The Court: All right.

(Witness excused.)

Put your man on the stand.

Mr. Grady: We will make him available, your Honor. I don't know whether he has——

The Court: Oh, he is not here?

Mr. Grady: We can make him available, but it will take some computation.

The Court: Well then, we can do it at 2 o'clock.

Are you going to offer any testimony, Mr. Wyshak?

Mr. Wyshak: No oral testimony.

The Court: Have you got any documentary evidence?

Mr. Wyshak: Yes, your Honor. I think we should be finished today, your Honor; if that is what you had in mind.

The Court: All right. I will examine more thoroughly some of these exhibits which I have looked at, with the ones that have been introduced.

Mr. Grady: I might say, your Honor, that our next evidence will be two depositions which are on

file. Do you have any objection to the judge reading them during the noon recess, Mr. Wyshak?

Mr. Wyshak: I have some objection to the depositions, yes.

Mr. Grady: We would be willing to let your Honor read those.

The Court: Well, I may read them. However, I prefer, unless they are very long, that they be read into the record; especially if there are objections.

Are there any documents attached to the deposition?

Mr. Grady: Just two, your Honor.

The Court: Well, as long as there are objections, there is no use in reading them.

2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [90]

Mr. Grady: Your Honor, as Plaintiff's next exhibit I would like to introduce in evidence the claim for refund which was filed in this case with the Collector of Internal Revenue.

The Court: I thought a stipulation of facts admits that it was a timely demand for each, doesn't it?

Mr. Wyshak: I believe it does.

Mr. Grady: It does, your Honor, and I would just like to get the claim itself in evidence.

The Court: The only question isn't the form. The only question is whether it is timely and if the Government admits it was timely there is no ques-

tion left. However, if you want the form of it it is all right with me.

Mr. Grady: It is attached to the complaint and admitted in the answer. So I think that is probably sufficient. So I will withdraw the offer.

The Court: Accepted as an exhibit by reference.

Mr. Grady: All right, your Honor.

Your Honor, during the noon hour I think Mr. Tripps has had a chance to compute some of those figures Mr. Wyshak would like to have, and I offer Mr. Tripps—

The Court: All right. I might say that I have had an opportunity to go over more carefully the exhibits that were [91] introduced, and of course some of them are very lengthy, especially those relating to the various regulations; and, of course, in your argument you can call my attention specifically to the portions that you want to spare us.

JOHN P. TRIPPS

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

By Mr. Wyshak:

Q. How many cases of tuna were sold during each month at those prices, above the ceiling price?

A. I did this hurriedly, Mr. Wyshak, and manually, without an adding machine and I arrive at—in September, 18,077 cases; October, 36,245; November, 14,803; December, 27,031 — 96,000-plus

(Testimony of John P. Tripps.)

cases. This was done, as I say, very hurriedly and manually.

Q. That was for September, October, November and December? A. Correct.

Mr. Wyshak: Thank you.

Redirect Examination

By Mr. Grady:

Q. Mr. Tripps, would you explain how some cases are shipped on consignment and some are sold from Terminal Island? Will you explain how that procedure works in your company? [92]

Mr. Wyshak: I think that is irrelevant and immaterial.

The Court: No, overruled.

The Witness: We ship on consignment for various reasons: one, accommodation of buyers, and storage facilities of our own. We ship to public warehouses, we leave it there in our name, our broker sells it, bills it on the buyer and sends us a copy of our invoice.

Q. By Mr. Grady: Well, by what period of time does the invoice which you receive from the broker follow the time that you tell him to go ahead and invoice?

A. Oh, it might be a week, 10 days, two weeks.

Mr. Grady: No further questions.

The Court: Let me ask you this question: The invoice I saw was made in your name?

The Witness: Yes, sir.

(Testimony of John P. Tripps.)

The Court: Does the broker send out that invoice in your behalf, or do you?

The Witness: That particular one happened to be made by us on a shipment made direct from Terminal Island.

The Court: Now, on those made by brokers, is the invoice sent in your name?

The Witness: Yes, sir, it is on our invoice head.

The Court: Then how do you know which broker—does the broker have a notation on it, or do you know who gets the commission? [93]

The Witness: His name is right on—the broker's name appears on that invoice.

The Court: That is what I wanted to know, because the practice may not be the same in all industries, you see.

The Witness: Correct.

The Court: As to what brokers actually do.

The Witness: This may be beside the point: However, all of our sales are made through brokers, whether we ship it direct or whether we ship it through consignment.

The Court: All right.

Mr. Grady: That is all.

The Court: You may be excused.

(Witness excused.)

Mr. Grady: Next, I would like to introduce a deposition taken on behalf of the plaintiff of Charles W. Triggs, who has been referred to here in the testimony. I don't know what your Honor's pleasure is, but if it is agreeable, I would like to

have Mr. Mackay take the stand, and I will ask the questions.

The Court: Yes. That is a good way of doing it. Many times, gentlemen, I agree to read depositions, but if they are too long, and especially if counsel reserve objections, we do that.

Mr. Grady: May we take the original from the file?

The Clerk: Deposition of whom? [94]

Mr. Grady: Charles W. Triggs taken on behalf of the plaintiff. I think there are two in there.

Your Honor, this one says that it is taken on behalf of the defendant. It may have both of them in there, I don't know. We intend to introduce both of them, anyway.

The Court: All right. Let us open it up and take it out, whatever you want.

Mr. Grady: Would you excuse me just a moment, your Honor? I will see if I can find out where the other one is.

The Clerk: If you check the clerk's office their documents will show the document.

Mr. Grady: We will read the one taken on behalf of the defendant first, the deposition of Charles W. Triggs.

The Court: All right.

Mr. Grady: "Deposition of Charles W. Triggs, taken on behalf of defendant, at 10:00 o'clock a.m., Thursday, August 5, 1954, at Room 728, 523 West Sixth Street, Los Angeles, California, before Arlene Jenkins, a Notary Public within and for the County

of Los Angeles, State of California, pursuant to stipulation and order to take deposition hereunto attached.

“Appearances: For the Plaintiff: Mackay, McGregor, Reynolds & Bennion, by A. Calder Mackay, Esq., and Stafford R. Grady, Esq., 523 West Sixth Street, Los Angeles 14, California, and [95] Roland G. Swaffield, Esq., Farmers & Merchants Bank Bldg., Long Beach, California. For the Defendant: Laughlin E. Waters, United States Attorney; by Robert H. Wyshak, Assistant United States Attorney.

CHARLES W. TRIGGS

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Wyshak:

Q. What is your name and address, please, sir?

A. Charles W. Triggs, T-r-i-g-g-s, 737 North Michigan Avenue, Chicago, Illinois.

Q. What is your present business or occupation?

A. I am the owner of Triggs Brokerage, fish and oyster—fish and seafood, rather, brokerage.

Q. During the years 1942 and '43, were you employed by the Government in Washington, D. C.?

A. I was employed as head of the Fish Section of Office of Price Administration.

Q. And how long were you employed in that capacity?

A. From February 10, 1942, until April 15, 1944.

Q. Did you have any title while so employed?

(Deposition of Charles W. Triggs.)

A. Chief of that division, Fish and Seafood Division.

Q. While you were in that capacity, did you have any conversation with the representatives of the French Sardine Company of California?

A. I did.

Q. And whom did you speak with?

A. Williams, Doc Williams. What were his initials?

Mr. Mackay: A. T. Williams.

The Witness: A. T. Williams, always known as Doc.

Q. By Mr. Wyshak: And do you know what his capacity was?

A. Sales manager of the French Sardine Company.

Q. Was anyone else present during this conversation? A. Not in Washington.

Q. And can you recall approximately when these conversations took place?

A. During the summer of 1942. Had a number of conversations when he was in Washington.

Q. In your office?

A. In my office in Washington.

Q. And what were these conversations with respect to? [97]

A. In respect to the price of tuna, canned tuna.

Q. Do you mean with particular reference to the French Sardine Company? A. Pardon?

Q. With particular reference to the French Sardine Company?

(Deposition of Charles W. Triggs.)

A. With particular reference to the French Sardine Company and the relative position between the French Sardine Company and other tuna packers.

Q. That was with respect to the ceiling price.

A. That was with respect to the ceiling price.

Q. Can you give us the content of those conversations?

A. It was in regard to the regulation that we were to get out covering the price of canned tuna. A regulation that we tried to get out in February of 1942 was not successful because the assistant to Henderson, the Administrator, refused to approve it. We then had to consider getting another regulation out, but owing to many regulations that we had to get out on canned fish and frozen and fresh fish there was considerable delay in getting out a new regulation, and the prices in force at the time were those that were stipulated by general maximum price regulation.

Q. Then, at that time there was no question as to what the ceiling price for canned tuna for the [98] French Sardine Company was?

A. The price was fixed by general maximum price regulation, which fixed the price at whatever price they had in March of 1942.

Q. What I mean is, there was no dispute as to what the ceiling price was at that time?

A. No dispute at that time.

Mr. Mackay: Let's clear that up. Of what time are you speaking?

(Deposition of Charles W. Triggs.)

Mr. Wyshak: When he had these conversations in the middle of 1942 with Mr. Williams.

The Witness: In the middle of 1942 there was some question. Of course, the regulation in force was general price maximum regulation until we got a new regulation.

Q. By Mr. Wyshak: In February 1943, was it?

A. That was in January of 1943.

Q. January?

A. That the new regulation came out.

Q. Well, what was the question with regard to their ceiling in the summer of 1942?

A. The question was about the position that the French Sardine Company was in with an \$11 ceiling while their competitors had higher ceiling prices.

Q. But there was no question as to the interpretation [99] of the regulations at that time, was there?

A. No question of the interpretation. It was the general maximum price regulation.

Q. Was there any discussion regarding the French Sardine Company raising its prices at that time?

A. During that summer Mr. Williams came to Washington. We discussed their situation and there was some talk about prices that they might be entitled to, and I think that at least four or five times Mr. Williams must have seen me before the regulation—the new regulation went into effect.

Q. Well, did you——

(Deposition of Charles W. Triggs.)

A. And—pardon me—he also telephoned numerous times from Terminal Island to see if we were going to get out the regulation.

Q. Did you advise him that it would be all right with you if they raised their prices over the \$11 ceiling at that time?

A. I discussed with him what we were doing on other canned fish, such as salmon, sardines, crab meat and shrimp, discussed that with him, and the way we had handled the ceilings on those items, canned salmon, for instance, would be based on the previous season pack plus a certain amount that would probably cover additional costs over the previous season. In other [100] words, we had to consider additional costs over and above what the previous year's price was.

Q. Well, during these discussions in 1942, did you at any time tell him that it was all right with you if the French Sardine Company raised its prices? A. Well—

Mr. Mackay: Just a moment. I object to that as a leading question.

Mr. Wyshak: The question has already been asked, Mr. Mackay.

Mr. Mackay: Well, whether it has or not, it is a leading question. If you want to ask him about the substance of the conversation, all right.

The Witness: Repeat the question.

Mr. Wyshak: Will you read the question, please?

Mr. Mackay: I will withdraw it to save time.

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Will you please read the question?

(Question read.)

The Witness: I had no authority to tell anyone to raise their prices. I would discuss with him what they might be entitled to in the way of a price, but as for giving definite instructions, I am not in a position to do that.

Mr. Wyshak: Then, you didn't?

The Witness: Not definite instructions, no; no [101] definite instructions to raise prices.

Q. By Mr. Wyshak: Was there any discussion during these conversations regarding what you might do for the company if a complaint were brought against the company by the OPA for making charges over the ceiling prices?

A. Well, I can't say that there was.

Q. Well, can you say that there was not?

A. Any discussion about what I would do?

Q. Yes. Did you make a commitment to them?

A. Well, I might have made the statement that I would support anything that they might do if it was within reason. That would be logical for me to do. Inasmuch as we were allowing increased prices on other canned fish, I might possibly have made the statement they wouldn't be taking any chances or something of that kind.

Q. I didn't hear you.

A. That they might not be taking any great chances in raising the price because I was of the firm belief that they were in a bad position.

(Deposition of Charles W. Triggs.)

Q. Well, did you say that you would try to quash any complaint that might be brought against them?

A. I wouldn't say quash complaints, no. I [102] wouldn't say that.

Q. You mean you didn't say that?

A. I don't think I said that, no. In answer, I wouldn't be in a position to say that because the powers that be hired me to administer it, and I would say on that I might have been willing to recommend certain things.

Q. You do know, do you not, that charges were brought against the French Sardine Company for overceiling sales? A. Overceiling?

Q. Yes. A. Yes, I know.

Q. And you do know that the matter was settled on the basis of single damages——

A. Yes.

Q. ——being accepted?

A. Yes.

Q. Did the OPA at that time have any policy respecting accepting single damages?

A. The policy of the OPA was to accept single damages in certain cases. In very flagrant violations sometimes they would assess treble damages.

Q. Was there any policy about accepting single damages to avoid litigation? [103]

A. To what?

Q. Accepting single damages to avoid litigation.

A. Well, I think that was done as a matter of policy at times.

(Deposition of Charles W. Triggs.)

Q. Would you say it was done in this case?

A. Well, it might be in this case.

Q. Well, do you know if it was in this case?

A. I don't know.

Q. You don't know?

A. No. I might—I knew what happened afterward, that the enforcement man in Washington, a man named Greenberg, showed me a check—showed me the check which was given and wanted to know if I thought they ought to send it back for treble. I told him at that time—I explained the nature of the whole case and told him if I had my way I would send the check back and let him keep it.

Mr. Wyshak: For the record, would you put in my statement that Mr. Triggs' last statement should be stricken as not responsive to any question.

Mr. Mackay: May I ask the witness at this time: When you say you told him to send it back to the French Sardine Company?

The Witness: Send it back to the French Sardine Company, yes. [104]

Q. By Mr. Wyshak: Prior to the issuance of the new regulation in January of 1943, was there anything in the OPA regulations to justify an unauthorized increase in the price of canned fish with a notation on the invoice to the purchaser that the overcharge would be refunded if it were not subsequently approved?

Mr. Mackay: You are asking him a legal question. Regulations could vary.

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Well, perhaps the witness knows the answer.

Mr. Mackay: Well, we object to it, calling for a conclusion of the witness."

The Court: Unless you tell me you are insisting on the objection, I don't know whether you want me to pass on it or not.

Mr. Grady: We don't insist on it, your Honor.

The Court: Go on.

Mr. Grady: (Reading)

"The Witness: Well, I couldn't say if there was any——

Mr. Mackay: Not the best evidence."

Mr. Grady: I waive that objection, too, your Honor.

"The Witness: ——provision for an instance of that occasion, putting on the invoice. I couldn't say as to that. [105]

Q. By Mr. Wyshak: You don't know of any?

A. I couldn't say. It might have been done in some divisions of OPA.

Q. But on canned fish it wasn't done?

A. Not to my knowledge, no.

Mr. Wyshak: That is all.

Cross Examination

By Mr. Mackay:

Q. Now, Mr. Triggs, you have been asked about general maximum price regulation. I think that came out in April of 1942, didn't it?

A. '42, yes; April '42.

(Deposition of Charles W. Triggs.)

Q. What did that do with respect to establishing ceilings for the individual canners of fish?

A. It fixed the prices at their selling prices in March of that year.

Q. In March of 1942?

A. Yes, March of '42.

Q. Were you then made acquainted with the price ceiling problems on fancy tuna which confronted the French Sardine Company during 1942 and '43?

A. I was.

Q. And do you remember what the ceiling price was based upon their March 1942 prices?

A. The ceiling price we finally—— [106]

Q. No, no. The price finally based on their March 1942——

A. Well, the ceiling price on French Sardine was \$11.

Q. How did that compare with other competitors in that area?"

Mr. Wyshak: Your Honor, I will object to that as calling for a conclusion of the witness, and not proper cross examination.

The Court: Overruled.

"Mr. Mackay: Well, you have asked about certain conversations here and——"

Mr. Grady: Oh, this is colloquy on the objection. If it has been ruled upon, I will omit it.

The Court: All right.

Mr. Grady: The question was then read, your Honor, and the witness answered it on page 12,

(Deposition of Charles W. Triggs.)

line 12. So to re-orient the witness I will ask the question again.

“Q. How did that compare with other competitors in that area?

The Witness: It was very low.

Q. By Mr. Mackay: You said that Mr. Williams had visited Washington several times during the summer of 1942 and that he had often telephoned to you. He had written to you also, I suppose? [107] A. He had, yes.

Q. And what was the purpose of his coming to you and having these conversations about which you have been asked by counsel?

A. To ascertain how soon we could get a regulation into effect that would permit them to increase their selling price.

Q. Now, with such a low ceiling price of \$11 a case that French Sardine had under general maximum price regulation, how did that affect them with respect to their competitors, particularly with respect to purchasing raw fish?”

Mr. Wyshak: Your Honor, I object to that on the grounds that it is hearsay and also is calling for a conclusion of the witness.

The Court: I assume that was rather speculative. The objection is sustained.

Mr. Grady: I will skip the answer then, your Honor, and proceed with the next question, which begins at line 13, page 13.

“Q. By Mr. Mackay: Well, in your opinion,

(Deposition of Charles W. Triggs.)

would that put them at a great disadvantage because of that?"

Mr. Wyshak: I object to that——

The Court: That goes with the other one. The objection is sustained. [108]

Mr. Grady: I think the next two or three follow the same line.

The Court: Then it will be understood they all fall in the same category. Go to the next starting point.

Mr. Grady: Beginning at line 25 on page 13:

"Q. By Mr. Mackay: Now, Mr. Triggs, as a result of your conversations with Mr. A. T. Williams, who was sales manager of French Sardine Company, did you look into their situation for the purpose of determining whether the ceiling prices of the French Sardine based upon their prices in March 1942 as required by general maximum price regulation were too low?

A. I was quite familiar with what was happening in the situation of this kind. The demand was so great that there was a tendency to bid prices up. In fact, I know that there was very sharp competition in buying of tuna from the boats."

Mr. Wyshak: I move to strike that, your Honor, as not responsive to the question. It is irrelevant.

The Court: Well, I think it is responsive all right. But I think the last paragraph may be stricken, about the competition. I think the first part may remain.

Mr. Grady: "Q. Was it your opinion after talk-

(Deposition of Charles W. Triggs.)

ing with Mr. Williams and investigating their ceiling [109] prices that their ceiling prices were too low and some relief should be given to them?"

Mr. Wyshak: I object to that, your Honor, as irrelevant and incompetent.

The Court: Oh, no, it certainly isn't. When you fix the price by formula, but a price of a certain date, then it is a question of whether the price was correctly fixed as of that date is material.

Mr. Wyshak: But he isn't answering that, your Honor.

The Court: He says in his opinion—he was asked if it was too low considering all the other elements. He is supposed to know. He is the man in charge.

Mr. Wyshak: He has testified as to what their ceiling price was—\$11 a case; and that that was the ceiling price.

The Court: Well, if it was too low, then the OPA had no right to fix it at that price. He has a right to be discussing it.

Mr. Wyshak: Well, I think what the witness means was their ceiling price was low compared to their competitors; speaking absolutely——

The Court: Well, you can argue that but I don't want to argue. Let us go on and get the evidence in.

(Whereupon Mr. Grady and Mr. Mackay continued to read the deposition.)

"A. I was certainly of that opinion. [110]

Q. And did you have that opinion in the summer of 1942? A. In the summer of 1942.

(Deposition of Charles W. Triggs.)

Q. Yes. Did you so state to Mr. Williams? Did you advise Mr. Williams that the prices were too low or did you agree with Mr. Williams that their ceiling prices were too low?"

Mr. Wyshak: I object to that as a leading question.

The Court: No. That is overruled. This is cross examination. He is cross examining your witness. Overruled.

Mr. Mackay: (Reading)

"A. I didn't advise him. I agreed with him that the prices were too low.

Q. That's what I mean. Having determined in the summer of 1942 that the ceiling prices of French Sardine Company with respect to canned tuna were too low, what steps did you take or were taken by the OPA to alleviate that situation?

A. No steps were taken that would alleviate that. That is, nothing was done until the new regulation came out. Consideration was given to the situation through the summer and fall of 1942, but owing to the amount of work that we had getting out other regulations, amendments and so forth, we did not have the staff to get out a tuna regulation until—the [111] record shows—January 13th; but it was well known through the latter part of the summer of 1942, not only by myself but by members of the staff, that we had to have a higher level of prices which in addition—outside of tuna would apply to other commodities as well, such as I stated before on salmon.

(Deposition of Charles W. Triggs.)

Q. Did you have any conversation either in person or by telephone with Mr. Williams in the summer or late summer of 1942 to the effect that he advised you that the company had shipped some tuna but not billed it?

A. I had some conversation with him, but he had written regarding that. That I think is a matter of record in writing where he stated what they intended to do and notified me to that effect.

Q. Yes. Do you recall whether or not Mr. Williams advised you because of the delay in getting out the new regulation which would give them some relief that it would become necessary for them to invoice some of the shipments that had been made at the price of \$12 and that they would refund to the customers \$1.00 in the event that the new regulation did not come out by October 31st?

A. He advised me to that effect. [112]

Q. Do you recall about when that was, Mr. Triggs?

A. He wrote me some time in the month of September that they were going to invoice at \$12 and that in the event the regulation was not issued by October 31st that they would refund the \$1.00 per case that they were charging over the regular level of the price.

Q. Now, I will ask you if a regulation was issued by the OPA subsequently fixing the ceiling price of tuna for French Sardine at \$12 a case?"

Mr. Wyshak: I object to that, your Honor, as irrelevant and immaterial.

(Deposition of Charles W. Triggs.)

The Court: All right. Overruled. This entire thing is very material.

Mr. Mackay: (Reading)

"A. \$12, yes.

Q. Do you recall when that regulation was issued? A. When?

Q. Yes.

A. I think it was January 13, 1953.

Q. '43, you mean?

A. I mean '43, yes.

Q. Now, in your direct examination you stated, I think, that you were shown a check by Mr. Greenberg [113] of the French Sardine Company. I will ask you about when that was shown to you. Do you recall?

A. It was I think some time during the month of June, about the middle or latter part of June 1943.

Q. 1943. I show you a check and I will ask you if that is the check that you were shown by Mr. Greenberg.

A. I think it is. That is the amount.

Mr. Mackay: That is the amount? And it is made out to the Treasurer of the United States. I would like to have this marked for identification."

Mr. Grady: Your Honor, the document was marked for identification, and the shorthand reporter's signature and markings are on it. I think Mr. Wyshak has seen the check. And I now offer the check in evidence.

The Court: It may be received.

(Deposition of Charles W. Triggs.)

The Clerk: Plaintiff's Exhibit 36 in evidence.

(The document referred to, marked Plaintiff's Exhibit 36, was received in evidence.)

"Q. By Mr. Mackay: Mr. Triggs, when you were shown this check by Mr. Greenberg—first, let me ask you who Mr. Greenberg was at that time.

A. He was in charge of the enforcement of Food Division of the OPA.

Q. Of the OPA? [114] A. Yes.

Mr. Wyshak: In Los Angeles?

The Witness: In Washington.

Q. By Mr. Mackay: In Washington?

A. Yes.

Q. And will you please state again what you said when you were shown that check?

A. I told—I explained the circumstances of how that was received by the government, by OPA in Los Angeles, and told him that, knowing what I did, if I had my way I would return the check to the French Sardine Company or Los Angeles and have it returned to the French Sardine Company, and that was in response to a question he asked me if I thought they should return the check to the Los Angeles Regional Office for treble.

Q. For treble damages? A. Pardon?

Q. For treble damages?

A. Treble damages."

Mr. Grady: Mr. Wyshak, you interposed an objection at that time. Do you wish to state it now?

Mr. Wyshak: No.

The Court: All right.

(Deposition of Charles W. Triggs.)

Mr. Grady: (Reading) [115]

"Q. And you made that statement in June of 1943? A. June 1943.

Q. Let me ask you this: If that statement you then made to Mr. Greenberg was based upon your conviction at that time as Chief of the Fish Section that there had been no violation or intention of violation of the law or regulations by the French Sardine Company?"

Mr. Wyshak: I will object to that, your Honor, as irrelevant what the OPA thought about it.

The Court: Overruled. Go ahead.

"The Witness: I based that on the knowledge that I had received and knowing that the French Sardine Company had tried to go along with OPA and not violate and knowing what the price of tuna—price of other canners. I had no hesitancy in stating that French Sardine Company should not be prosecuted for violation because what they did was really open and above board.

Q. By Mr. Mackay: In your dealings with the French Sardine Company during 1942 did you find anything in connection with this ceiling price, any act on their part which would indicate that they did not want to come along and not co-operate with the Price Administration Office?

A. Not at all. [116]

The fact that they communicated with me repeatedly, called me on the phone, and Mr. Williams visited me in Washington, my office there, the Office of Price Administration, at different times,

(Deposition of Charles W. Triggs.)

assured me that there was no effort being made on their part to violate. I was conversant with what was going on.

Q. Well, now, Mr. Triggs, can you give the substance of the discussion with Mr. Williams relative to the raise in French Sardine's price of tuna?

A. You mean before the regulation——

Q. Yes, the summer of 1942.

A. Well——

Mr. Wyshak: Which conversation do you mean?

Mr. Mackay: Well, the one he had in the summer of 1942 that you asked him about.

Mr. Wyshak: Well, he had several of them.

Mr. Mackay: Well, you did not identify them.

Q. Can you identify them? I will say the discussion you had in July or August 1942.

A. In August 1942 we discussed what was doing on other canned fish, and I am quite sure I left the impression with him that they would be entitled to an increase in price because I felt sure we were going to establish a higher price—in fact, I knew we were—establish a higher price than \$11; and even if it was [117] based on the average of the various canners it would be not only \$12 but I think higher than \$12. So that was the reason why I would have discussed with him the possibilities of an increase in price.

Mr. Wyshak: This was only if the new regulation was put into effect?

The Witness: Pardon?

(Deposition of Charles W. Triggs.)

Mr. Wyshak: Only if the new regulation was put into effect?

The Witness: If a new regulation was put in effect, yes.

Q. By Mr. Mackay: Was discussion had there with respect to shrimp or salmon?

A. Pardon?

Q. Did you have any discussion at that time with respect to shrimp or salmon?"

Mr. Wyshak: I object to that as immaterial and irrelevant.

The Court: Overruled.

"The Witness: Yes, I discussed other canned fish as well.

Q. By Mr. Mackay: Well, did that have any relation to the contemplated increase in the price of sardines?"

Mr. Wyshak: Same objection. [118]

The Court: Overruled.

"A. It would have some relation because we were establishing a policy of allowing an increase in price to cover increase in costs from the previous season.

Mr. Wyshak: Under regulations?

The Witness: In the regulation we were allowing—yes, in the regulation we were putting into effect during the summer of 1942 allowance was made for increased costs.

Q. By Mr. Mackay: Now, I think you stated a while ago that the ceiling price of French Sardine of \$11 we talked about was lower than the com-

(Deposition of Charles W. Triggs.)

petitors'. Do you know how much lower? What was the competitors' price approximately?"

Mr. Wyshak: I object to that as irrelevant and immaterial.

The Court: Overruled.

"The Witness: I know the price was as high as \$13.75, and I think that information could very readily be secured from the various canneries and I think if you would secure that you would get actual figures as to what ceilings were.

Q. By Mr. Mackay: Mr. Triggs, was the delay in getting out a new price ceiling regulation caused in [119] any respect by your unwillingness to set a higher ceiling price on French Sardine tuna?

A. Not at all. The delay was entirely caused by the amount of work we had to do in getting out various regulations, not only canned fish but frozen fish and fresh fish. We had an immense amount of work, a limited staff, and it takes quite a long time to gather—it did take quite a time to gather the necessary information that would warrant our establishing the regulation."

Mr. Grady: Do you want to state your own objections, Mr. Wyshak?

Mr. Wyshak: I waive it.

The Court: Go ahead.

"Q. By Mr. Mackay: Well, under those circumstances is it fair to deduce from your testimony that the industry was reasonable in its expectation that a higher price would be fixed?"

Mr. Wyshak: Objected to, your Honor, as call-

(Deposition of Charles W. Triggs.)

ing for a conclusion of the witness; irrelevant and immaterial.

The Court: Overruled.

“The Witness: I think that would depend largely upon the members of the industry. A canner who was fortunate to have a high ceiling price under general max would not be so anxious I think to see the [120] regulation of a canner who had a low ceiling price.

Q. By Mr. Mackay: Now, you stated that the French Sardine had advised you that it was going to sell its tuna and bill the customers at \$12 and refund it if the regulation did not come out. Were you also furnished a copy of the notice to the brokers and others who might have been interested in it? A. I was.

Q. I show you what appears to be a mimeographed letter dated September 24, 1942, addressed To Whom It May Concern, on the French Sardine Company letterhead and signed by the French Sardine Company, Inc., and I will ask you if you will please read that and then tell us whether or not you received a copy of that from the French Sardine Company in 1942.”

Mr. Wyshak: Your Honor, I object to that as not within the scope of proper cross examination.

The Court: Overruled.

“The Witness: Yes, we received a copy of that letter.

Mr. Mackay: I would like to have this marked for identification.”

(Deposition of Charles W. Triggs.)

The Court: Is that a different letter from the letter you have now?

Mr. Grady: Your Honor, we put the original in the [121] record this morning as one of the several documents——

The Court: We don't need it except to show he knew of the contents.

Mr. Grady: That's right.

The Court: You don't need to put it in.

Mr. Grady: It is a mimeograph dated September 24, 1942; one of the several attached to Exhibit 35.

The Court: All right.

“Mr. Mackay: That is all on cross examination.

I would like to take a recess for about three minutes if it is all right with you.

Mr. Wyshak: I just want to ask about three questions.

Mr. Mackay: Oh, I beg your pardon.

Redirect Examination

By Mr. Wyshak:

Q. Mr. Mackay asked you questions about the French Sardine Company's prices being too low in the summer of 1942, and you agreed that they were too low. You do not mean to imply by that, do you, that their prices were lower than allowable under the existing OPA regulations at that time?

A. No, not lower than.

Q. They were as high as they could be, were they not? [122]

A. It was higher.

Q. As high as it could be under the regulations?

(Deposition of Charles W. Triggs.)

A. According to the general max, which fixed the prices at March 1942.

Q. When Mr. Williams told you that they had that notation on the invoice that is described in the mimeographed letter which you were shown by Mr. Mackay, did you make any comment to Mr. Williams about the invoices as they were going out?

A. You mean as to whether I agreed to it?

Q. Whether you would okay it or authorize it?

A. No, I was not in position to okay it or authorize it.

Q. Well, did you say that it was all right by you?

A. I might have expressed myself as being agreeable to it, but as far as giving authority, I was not in a position to do that.

Q. Well, the ceiling price for the French Sardine Company for this tuna at that time was \$11 per case, was it not?

A. As long as general max was in effect, the legal price was \$11.

Q. \$11 a case? A. Yes. [123]

Q. And French Sardine knew it was \$11 a case, did they not? A. Oh, yes.

Q. That anything charged over \$11 a case would be a violation of the regulation?

Mr. Mackay: I object to that as calling for a conclusion."

The Court: Overruled.

"Mr. Wyshak: Would you answer?

Mr. Swaffield: Well, just a moment.

(Deposition of Charles W. Triggs.)

The Witness: Well——

Mr. Swaffield: Just a moment. Would you define the word 'violation' as you use it?

Mr. Wyshak: Well, perhaps the witness understands me.

Mr. Mackay: I object to that. After all, the law says 'intentionally violate.' You don't mean to tell me that a company that has done as these people have done there would have any intention to violate the law?

Mr. Wyshak: Well, I think it was clear it was a violation and they charged in excess of \$11.

Mr. Mackay: That is exactly what we say, there was not a violation of the law.

Mr. Wyshak: Well, Mr. Triggs knew the regulation [124] at that time.

Q. Would it be a violation?

A. A violation of the general max, yes.

Q. It would be a violation of the general maximum regulation?

A. Yes.

Q. Was there anything in the regulations about shipping merchandise and not billing it, not billing for it in the ordinary course of business? In other words, delaying billing for it?

A. Not to my knowledge.

Mr. Wyshak: That is all.

Recross Examination

By Mr. Mackay:

Q. Well, now, Mr. Triggs, when you stated that

(Deposition of Charles W. Triggs.)

any prices charged in excess of \$11 would be a violation, do you mean to imply that there would be a willful violation or just a technical violation?"

Mr. Wyshak: I object as immaterial.

The Court: Overruled.

"A. I would say it was a technical violation. I couldn't say it was a willful violation. It might be a technical violation.

Q. Well, was there anything done by——

A. There was nothing in my experience in the [125] office there——

Mr. Wyshak: I move to strike that as not responsive.

Mr. Mackay: If you don't let him finish, you don't know what you are striking.

The Witness: ——to indicate that it was willful. Because of the mere fact that he took things up with me repeatedly to find out when we were getting out a regulation I think is evidence of the fact that it wasn't anything willful. It might be technical but I don't think you could say that it would be willful."

Mr. Wyshak: I move to strike it, your Honor, as calling for a conclusion of the witness.

The Court: Motion denied.

"Redirect Examination

By Mr. Wyshak:

Q. Well, he knew that the ceiling price was \$11——

(Deposition of Charles W. Triggs.)

Mr. Mackay: We will admit that they did.

Q. By Mr. Wyshak: ———and he knew that if he charged anything in excess of that it was not in accordance with the regulations? A. Yes.

Q. And he knew what he was doing?

Mr. Mackay: Wait a minute. I object to that as [126] improper direct examination.

Q. By Mr. Wyshak: The French Sardine Company knew what it was doing? A. Yes.

Mr. Mackay: We will admit for the record that the French Sardine Company knew that the price was \$11. We further admit that we went back there and put forth every effort we had to comply with the regulations and the law; but we deny that there was any intentional violation or any violation of the law or the Act.

Mr. Wyshak: That is all."

The Court: All right.

Mr. Grady: Your Honor, I am at a loss to understand why the original deposition taken on behalf of the plaintiffs was not filed.

The Court: Whose deposition was that?

Mr. Grady: This was the deposition taken on behalf of the defendant which we just read.

The Court: Whose deposition did you take?

Mr. Grady: We took the deposition of the same man on behalf of the plaintiff.

The Court: What difference does it make?

Mr. Grady: Well, I think it would be cumulative.

The Court: The presumption is he testified the same [127] way on each occasion. I don't know why it wasn't here. We don't have it. Where did you take it?

Mr. Grady: It was taken at the same time and same place, and we have attempted to contact the reporter who took them, who apparently forgot to file it. And we find that she is in Judge Tolin's court and will not be free until 3:15.

The Court: You can send her a message to be asked to be handed to her by the clerk. If you are finished we can have a short recess while you go over and send a message to the clerk and ask for—who was it, Virginia Pickering?

Mr. Grady: Yes. Well, Arlene Jenkins, one of her girls, did it.

Your Honor, may I suggest this: We have a copy of it, and we are perfectly willing to introduce the copy in evidence, if that would be agreeable with you.

The Court: Is there any disparity? What is the idea of incumbering the record. You have a terrific record as it is. What is the idea of incumbering the record with two versions of the deposition of the same person.

Mr. Grady: May I have a moment to discuss it with Mr. Mackay?

The Court: Unless there is something else where the witness has contradicted himself in one or the other.

Mr. Wyshak: They are substantially the same, your Honor.

The Court: You know, it is like an examination under [128] 43(b). If it is in the record you can base a finding on it. I have always held when a man is examined under 43(b) or under the 2055 Code of Civil Procedure, the evidence is in the record and you can't put him on again and go over the same ground. Lawyers in Superior Court said, "Well, I want to examine him on my own terms." What difference does that make. He is supposed to tell the truth either way. If you want to amplify, yes. So I don't know. I can't see where the advantage would be of having two depositions of the same person.

Mr. Mackay: There is only one thought I have, and if I could have just a short recess. There may have been some things in our deposition which we were unable to take on cross.

The Court: Well, we will take a short recess.

(Short recess taken.)

Mr. Grady: Your Honor, we have gone over the deposition taken on behalf of the plaintiff and find it to be in substance merely cumulative of the one which was taken on behalf of the defendant and already introduced, and we think it would only take the time of the court unduly to read the same thing over again. And we will therefore not do so, and rest our case.

The Court: All right. Mr. Wyshak?

Mr. Wyshak: I would at this time like to renew my [129] motion to strike all evidence having to do with what the ceiling price was at this pertinent time, with all evidence with respect to whether this

was or was not a violation of the OPA laws. And I base this motion on the ground, first of all, I feel that the plaintiff is precluded from going into it, based on a doctrine of waiver or estoppel, or adoption of administrative remedies, or whatever you want to call it; and that the only issue for this court's determination is as to the intent of the plaintiff when it did these acts. So that any evidence in that regard is irrelevant and immaterial to a determination by this court.

The Court: Well, the motion will be denied. And now that I am familiarizing myself with the case, I want to say that the Government in its memorandum has entirely misconceived the nature of this action. This is not an action seeking to relitigate in the Federal Courts before this court a matter which had been previously litigated in an action against the OPA to recover money which had been paid as a fine. All the cases the Government cites are to that effect.

This case comes clearly within the two cases decided by the Ninth Circuit, and you can't understand the second one which you cited in your brief without reading the first one, because the second one was on a finding of fact by the tax court which found upon sufficient evidence that the violation was an innocent one. You have to go back to the [130] first case, and that is *National Brass Works* against Commissioner of Internal Revenue, in order to find what the court decided.

In that case, the court was considering whether in that case the *National Brass Works* brought an

action to review a decision of the tax court finding that a determination deficiency of the Commissioner of Corporations was correct. The Commissioner was contending that a recovery by the Office of Price Administration in an action determined that a violation was willful. The court disagreed. The court analyzed the OPA statute under which the recovery is to be had and held that the recovery was not penal and the Tax Court had erred in so holding, and sent it back for the purpose of determining whether under the facts violation was fortuitous and whether, therefore, the violation had been innocently and unintentionally made, or not made through an unreasonable lack of care. The case was sent back to the Tax Court to make the finding.

Now, later on the Tax Court made such a finding, and the case, when it went up the second time, 205 Fed. 2d 104, the Circuit Court, under the statute, held that the finding was not clearly erroneous, there was substantial evidence to sustain it, and sustained it.

So all this testimony is material to determine whether the violation of the overcharge, for which recovery was had, [131] had been innocently and unintentionally made and not made through an unreasonable lack of care. And the letters which I have read, the discussions with the officials, the admissions of the officials themselves certainly bear upon that question, because if I had sustained your contention then there would be no evidence at all. You have objected to every bit of testimony, except the names of the witnesses, that has been intro-

duced, evidently on the misapprehension, as the first part of the brief indicates, that they are trying to relitigate whether they are seeking to recover from the Government this amount. They are not seeking to recover from the Government an amount they have paid, so your argument that they should have exhausted their administrative remedies is entirely beside the point. They are not seeking to recover from the Government in this lawsuit—what they are seeking, they sought a deduction just as though they had been sued and they defended a lawsuit and paid out attorneys' fees, and they come into court and your department had declined to allow that as an expense and they had sought the allowance of the expense. That doesn't mean getting back from the Government the amount, but getting back from the Government the amount of surplus taxes which resulted from the failure of the Government to allow that.

So, that is what we are dealing with here. This isn't a suit to recover an amount paid by failure to exhaust [132] administrative remedy. You are even wrong in your failure to exhaust administrative remedy. That recovery was not an administrative settlement. It was a court settlement. They failed to appeal from the judgment because it was a consent judgment. So your entire first part of the brief has absolutely nothing to do with the case, based upon an entire misconception of the nature of this lawsuit.

The motion will be denied.

Have you any evidence you desire to offer, or do

you rely on the showing made or whatever contrary inferences may be drawn?

Mr. Wyshak: I had just intended to read one page from this other deposition, your Honor.

The Court: All right.

Mr. Wyshak: This is the deposition taken by the plaintiff of Charles W. Triggs at the same time and place that the other deposition was taken.

Mr. Grady: What is the page?

Mr. Wyshak: No. 23. The question is by myself to Mr. Triggs.

"Q. At the time of your conversations with Mr. Williams regarding the new regulation on king salmon, did you tell Mr. Williams that it would be all right for the French Sardine Company to raise its prices by a proportionate increase? [133]

"A. No, I had no authority to do that.

"Q. Well, did you tell him that?

"A. I did not.

"Q. At the time the French Sardine Company was sending out tuna at \$12 a case when the ceiling price was \$11 a case, there was no question about the ceiling price being \$11 a case, was there?

"A. No.

"Q. French Sardine Company knew that the ceiling price was \$11 a case at that time?

"A. According to General Max.

"Q. Well, was there any other regulation in effect which would affect the ceiling price?

"A. None."

Mr. Wyshak: That is all, your Honor.

The Court: All right.

I will hear any argument you desire to present, gentlemen.

(Whereupon closing argument was presented by plaintiff and defendant.)

The Court: Gentlemen, I think that in this case we must bear in mind this fact: Under the old statute as it existed prior to 1948 the Tax Court was made the final arbiter of the determinations of fact. The language was held by some court to be stronger than the Federal Rules; by others weaker than the Federal Rules. And there are cases which [134] say upon the facts and the law there is a mixed question of fact and the law, that the reviewing court was subject to its own judgment.

In 1948 the Internal Revenue Code was amended and the section relating to the review by the Federal Courts was made to conform to the Federal Rules of Civil Procedure; and that is to Rule 52, which says, "Findings of a court shall be sustained unless they are clearly erroneous."

The new section—I can't think of the name of it—so holds. In fact, there is an opinion which I wrote for the Court of Appeals in the case of *Stockton vs. Commissioner of Internal Revenue*. It is out in the tax services, but isn't out in the advance sheets, yet. Of the eight opinions that I wrote this time on the Court of Appeals, four were on tax matters. Only one is out. But in *Stockton Hardware Company against the Commissioner of Internal Revenue* we were called upon to determine the effect of this amendment, because the court had determined in that particular case that property

was held in the ordinary course of business for sale in the ordinary course of business, and there was a very strong argument made that that conclusion was a mixed conclusion of fact and law, and we ought to apply the old rule. I wrote the opinion. And I pointed to the fact that whether you apply the old criterion or the present criterion, that is a question of fact and that therefore the opinion, being [135] sustained by ample evidence, cannot be disturbed. One of my associates dissented, but not on that point. He dissented upon a legal point. He agreed as to that point the court could have found one way or the other, and we could not disturb it.

I am making this observation because you can be misled by trying to apply the second *National Brass Works*, or the language used in *National Brass Works* to this situation. The court in *National Brass Works* was doing what we were doing in the *Stockton Hardware* case, that is, reviewing a ruling upon conflicting evidence. If the opinion had been the other way, the ruling would have been the same. So that the language you referred to doesn't help us at all.

The gist of the opinion lies in this: Now let us see how Judge Stephens interprets his own opinion in the prior case, and then let us go back to the prior case and forget this one, because nothing except the interpretation matters.

This is the way he interprets his own opinion:

"In the opinion filed by this court remanding the case for further proceedings, we said that a

payment to be held as an ordinary and necessary business expense must 'not frustrate the purposes of a statute or violate public policy,' must not be a 'fine in a criminal case', and must not be 'forfeiture in a case where it has been proven [136] that the forfeited article has been knowingly or carelessly permitted to be used for or toward an illegal purpose.' We held that petitioner's payment was not a fine or forfeiture within the above definitions. And, since the law violated was 'highly complex and difficult to comprehend', an expenditure incurred because of a proved violation of the Price Control Act, 50 U.S.C.A. Appendix, 901 et. seq., was not automatically precluded as a valid income tax deduction. Accordingly, the Tax Court was directed to allow the claim if, upon taking evidence, it determined that the overcharges had been 'innocently and unintentionally made and not made through an unreasonable lack of care.' "

That's the way Judge Stephens interpreted his own opinion. And if you read the portion of the opinion which he summarized here you have it in greater detail, so I am going to read it to you because this says specifically the fact that they violated it and paid for the violation does not preclude them from showing that it was an innocent violation. That is a violation where there was hope and expectation that the feeling would be changed and negotiations in that direction.

Let us read the paragraph which he paraphrased here. Now, we are going back and reading from 182 Fed. 2d 526 at [137] page 530.

“Study convinces us that, in these circumstances, an expense is ordinary and necessary if commonly experienced in the community, provided that the expenditure does not frustrate the purposes of a statute or violate public policy. And expense is not ordinary and necessary when it is a fine in a criminal case or a forfeiture in a case where it has been proven that the forfeited article has been knowingly or carelessly permitted to be used for or toward an illegal purpose. But this is not saying that the payment made to the Government was not ordinary and necessary solely because a law had been violated. Where, because of its nature, the law has been violated without intent or without carelessness tantamount to intent, violation of itself is not decisive of the problem.

“Here there was no fine or forfeiture under the above definitions of those terms. The law violated was highly complex and difficult to comprehend and therefore innocent violations were not uncommon. It was error in our opinion to conclude simply because the Price Control Act was admittedly violated and the expenditure was incurred as a direct consequence thereof that such expenditure was non-deductible [138] for income tax purposes.

“It seems to us that allowance of the sum paid to the Government may be allowed as a business deduction when the overcharge has been innocently and unintentionally made and not made through an unreasonable lack of care. The whole question resolves itself into proof with the burden on the claimant. Under such principle it is clear——”

We will eliminate that. They are talking about a fine.

“Where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense. Allowance of the deduction in these circumstances could not frustrate the enforcement of the Act.”

There is a very interesting footnote to the case which points to the fact that where a recovery is limited to the damages, that is to the exaction actually made, you see that evidences an absence of wrongful intent where the limit is not a minimum regardless of the amount. Now, where the limit is the minimum, the actual exaction, you see, and eliminates the trebling of damages, then you have simply a violation and you are free to show the circumstances under which that was arrived and why that was accepted. [139]

I was going to read from note 10, but that referred mostly—although I have summarized some of the holdings—that referred generally to the proposition that fixing of a damage of minimum, regardless of actually damages, evidenced an intent to impose a penalty to the violator as a deterrent rather than a method of restitution to the buyer.

Mr. Wyshak: Your Honor, my point is that it isn't a question of good faith or bad faith. The question is whether there was intent or not. In the next to the last paragraph of that opinion, it covers this.

“No payment to the Administrator made for overcharges in circumstances incompatible with innocence, or with reasonable care can be a necessary and ordinary expense.”

The Court: Well, then they modify it and say, “where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense.”

Mr. Wyshak: But here they intentionally billed, and it was an overcharge, your Honor.

The Court: Well, you are arguing against the facts. Just a minute.

Now, are you through?

Mr. Wyshak: Go ahead, your Honor. [140]

The Court: Well, if you aren't through arguing, I am going to stop. If you want to argue more, I will let you argue more. I am just giving you my reaction. I haven't decided the case yet. But it is not customary for a lawyer to start arguing over again when I begin to talk unless you are asked to do so. But if you want to present something, go ahead.

Mr. Wyshak: I am through, your Honor.

The Court: To show you how wrong you are in interpretation, let's look at 182 Fed. 2d 526.

“The case was submitted to the Tax Court on stipulated facts. In short, after examination of its books by O.P.A. investigators, petitioner admitted that between February 1, 1943, the effective date of such price regulations, and January 31, 1944, it

made sales of castings at prices in excess of the maximum prices so established. And, thereafter, 'in settlement of the Administrator's Claim for Treble Damages on account of violations of ceiling prices for non-ferrous castings', petitioner paid to the Government in 1944 the amount claimed and deducted on its 1944 return as a business expense."

So you have there an actual settlement of a claim for treble damages administratively on the basis of the allowance of the actual overcharges. And here you have a similar settlement, except that this settlement is after the suit [141] was brought. But I want to show you something else, that in this case the O.P.A. in its complaint did not seek treble damages. It merely sought such other relief as the court would grant. In other words, they themselves were not sure whether to ask for them, so they asked for general relief. And even if you admit that under that prayer the court could have granted them treble damages the fact remains that the complaint didn't seek them. This is one of those one-page complaints, and this is what they said. They allege that the defendant had violated the Act, and they didn't set forth the amount. And this was filed at the time when we were allowing them to file these blank. Later on we didn't allow them to file these blank complaints and required them to attach to the complaint a statement showing the exact amounts. Their argument was, "Well, we don't know the exact amount. We will prove it at the time of trial."

I said, "Give some indication." So this is what

they said: "For a preliminary injunction—" "—final injunction enjoining the defendant—" and so forth. "—from delivering tuna at excess prices, for such other relief—" They didn't specify any of the amount that had been paid or exacted in excess and didn't seek treble damages.

Mr. Wyshak: May I say something, your Honor?

The Court: Yes.

Mr. Wyshak: If I am not mistaken, your Honor, that complaint was filed after the check had been paid to the [142] Government. The check to the Government was in May. And I believe this consent judgment stipulation—

The Court: Well, I am not interested. But you are relying upon this consent judgment. This is not an administrative settlement.

Mr. Wyshak: Well, here is what I mean, your Honor,—

The Court: The payment to the Government is nothing. "It is stipulated here by and between the plaintiff, a corporation, that the defendant waives service of process that answers and all that may have the claim set forth in the complaint herein—" and so forth—"final judgment of the form annexed," and there was the form which issued the injunction. This was the 3rd of June, 1943.

Mr. Wyshak: Yes, your Honor. And the check for \$97,000 was paid over in May. In other words, this was something that came subsequent to that. If your Honor will refer to Exhibit 11, which is the letter from the French Sardine Company to Mr. Triggs.

The Court: Well then, the facts are the same. Then there was an administrative settlement. I thought that this judgment intended to cover the agreed settlement. If it was subsequent to it then we have exactly the same administrative settlement that we had in there.

Mr. Wyshak: Yes. What I wanted to point out, your Honor, in Exhibit 11, a letter from French Sardine Company [143] to Mr. Triggs points out that "The OPA investigators proceeded to tell us that we were extreme violators of the regulation and subject to fines for treble damages." So that the OPA did make a claim for treble damages.

The Court: You know, Mr. Wyshak, you are a very good—would you get me the Schneider case? You know, the other day in one of the most open and shut cases of family partnership you argued very eloquently that I ought to disallow it. I wonder if you read Schneider against Westover where the Court of Appeals reversed me in one of the partnership cases because I declined to allow a daughter to be included because she didn't perform any services. So I know your attitude, and I am not going to take the time I would have taken by analyzing the case, because it would merely mean I would get into an argument with you and I don't propose to argue with you.

I am satisfied on the facts in this case that this was not a willful violation; it was a fortuitous violation. There were discussions going on between these parties leading to the establishment of a higher ceiling than they had been allowed because

their prior price was held to be inadequate. Everybody from here to Washington agreed that the good faith is shown in the fact that in billing the goods through their brokers they stated that if the OPA should not recognize this as the basic price they would refund it, showing that at that time there were negotiations, which are undisputed [144] and established by the testimony of the Government's own witnesses. As a matter of fact it was expected at all times that the regulation would be changed and be made retroactive, as the OPA had a right to do that. The only reason why it wasn't put through was that they were too busy and when they got around to it they made the change conforming to what they had expected it would be, but they made it a few months later on.

Under the circumstances I think it would be a rank injustice not to allow the taxpayer, who endeavored so hard to conform to the law at the time when the Office of Price Administration itself was in the formative state and didn't know whether this comprehensive system would succeed, to penalize them by saying, "Well, they paid later on, admitted a violation. Therefore, they cannot recover."

I hold, therefore, that although they did make an administrative settlement, the evidence shows that the overcharges had been innocently and unintentionally made, and that they had taken reasonable care and had reasonable grounds to believe that a ceiling conformable to the discussions which had been going on informally would be established, which would enable them to do that. And all these

are evidence of good faith, and if I had the time I would take the time, but it would be a waste of time because it would merely bring more argument over the facts, and I don't propose to do that. [145] I merely wanted to indicate to counsel why I ruled as I do.

Therefore, judgment will be for the plaintiff, the amount to be computed according to Rule 7.

Mr. Grady: Thank you, your Honor.

Mr. Wyshak: Thank you, your Honor. [146]

[Endorsed]: Filed June 20, 1955.

PLAINTIFF'S EXHIBIT No. 1

MEMORANDUM

[Stamped]: Mailed Jun 7 1943 Legal Division.

In reply refer to: 2913:HAO June 5, 1943

To: John T. McTernan, Regional Enforcement Attorney, San Francisco Regional Office; from: Harry W. Jones, Assistant General Counsel, Food Enforcement Branch.

Per: Herman A. Greenberg, Chief Meat and Dairy Products Section.

Commodity: Canned Tuna Fish—GMPR

Subject: French Sardine Company, Inc., Terminal Island, California.

There is attached hereto copy of memorandum dated May 24, 1943, from the Los Angeles District Office to Harry W. Jones.

You will note that on Page 2 of the memoran-

dum Charles W. Triggs is quoted to the effect that he advised the French Sardine Company to violate GMPR and that he would quash any complaints that might be made because of the violation. It appears that the Los Angeles District Office took the ex parte statement of an officer of the Company as the basis for accepting single damages in settlement of the Administrator's treble damage action. On receipt of the memorandum we had a long discussion with Mr. Triggs. He assured us that at no time did he either recommend violation of the regulation or suggest that he might quash any proceedings for violation of the regulation. On the basis of Mr. Triggs' statement to us it appears that there is a substantial reason for accepting single damages. He claims that the Company had a fairly low ceiling under the GMPR last fall. The ceiling was \$11 per case while competitors ceilings went as high as \$17 per case. The Company was in constant communication with the Price Division of the National Office requesting relief and were assured that a dollar and cent regulation which would give them relief was to be issued momentarily. In fact MPR 299 was not issued until January 1943 at which time the maximum price for the tuna fish in question was fixed at \$12 per case. Pending the issuance of the regulation the French Sardine Company advised its customers that it was billing tuna fish at \$12 per case and that if a regulation issued by this office fixed a maximum price less than \$12 it would refund the difference to them. Apparently the Los Angeles office properly accepted the difference in

settlement of the treble damage suit by the Administrator and felt that there were mitigating circumstances justifying the acceptance of single damages. On the facts as we have them from Mr. Triggs, we are in agreement with the final action taken by the Los Angeles District Office and are therefore forwarding the Company's check to the Treasury.

We point out, however, that in this type of case where the District Office has some question in its own mind as to whether or not to accept a settlement it should request the advice of the Regional Office rather than communicating directly with Washington. The Washington Office is thus put in a position of exercising discretion which should have been exercised by the Regional Office. It is our understanding that Aaron Warner is sending you a more detailed memorandum on the general policy to be followed in the settlement of treble damage actions and the position of the regional office concerning those settlements.

Enclosure—HAGreenberg:sk

Certificate of Certification attached.

PLAINTIFF'S EXHIBIT No. 2

[Confirmation of Telegram sent French Sardine
Company, Terminal Island, California]

FH 124 NL—Terminal Island Calif. July 29, 1942

Charles M Elkinton

Office of Price Administration

Washington D C

After attending War Production Board hearing in Washington July Fourteenth our Sales Manager Williams visited principal markets throughout United States arriving back at plant today Stop He discussed wth brokers and trade generally the matter of ceilings particularly canned tuna and found our prices approximately three dollars case basis halves under competition Stop This fact is causing further confusion in price raw fish some competitors bidding higher prices also bonuses to fishermen Stop Would like see OPA take some action toward stabilizing situation by naming ceiling price in dollars and cents Stop Newspapers published today relief provision in favor of South Pacific Canning Company Long Beach making price ceiling 11.92 per case halves tuna please advise if we too may not have similar relief obliging

French Sardine Co Inc

ATW :lh

PLAINTIFF'S EXHIBIT No. 3

[Telegram]

War Production Board, Washington, D. C.

Telegraph Section Aug 10 2:33 pm '42 War Pro-
duction Board. Triggs

Via Postal Telegraph Via Western Union

W94 40 DL Food & Food Prod Price Br

SanPedro Calif 942A Aug 10 1942

Chas M Elkinton Office of Price Administration
(Washington DC)

If possible would appreciate very much receiving
wire answer collect to our letter of August First re-
garding relief on tuna price ceilings Stop Our op-
erations practically at standstill awaiting your re-
ply while competitors selling freely at higher prices
than ours

French Sardine Co Inc 224P

Than Ours

PLAINTIFF'S EXHIBIT No. 4

French Sardine Company

(Copy)

September 2, 1942

Office of Price Administration

1029 South Broadway

Los Angeles, California

Attention: Mr. L. M. Kearns

Gentlemen:

Complying with request in your letter of September 1st, File 8 LA LMK(P), we are enclosing herewith list of maximum prices at which we have made sales since the publication of The General Maximum Price Regulation of April 28, 1942. We ourselves, have not published or distributed a regular price list, but all of our sales, without exception, have been made on this basis since the effective date of the General Regulation, May 11, 1942.

We have not packed, quoted or sold any Tuna Flakes. We have packed and sold grated style only in lieu of flakes.

We did not make any Tuna sales in the month of March, 1942. In fact our supplies were so negligible we could not offer. Therefore, in arriving at our maximum prices, we placed them at levels equal to or below our closest competitor, which was the Van Camp Sea Food Company, Inc., Terminal Island, California.

While we did not possess the complete list of the Van Camp Sea Food Company, we did learn authoritatively that their price on Fancy Light Meat

Tuna was \$2.75 per dozen basis halves, and their price on Grated Tuna was \$2.58¾ per dozen halves. We then based our prices accordingly in the thought that as long as they were lower generally and no higher on any particular item, they were in line with the spirit and the letter of the General Regulation.

We follow a very definite sales policy making the same prices and the same discounts for all buyers alike. Enclosed list shows these prices and discounts. We have several brands for each grade, but make no price differential for brands.

We might refer to the items of Fancy White Meat Tuna and Grated White Meat Tuna. These packs were not available in Southern California during March, nor on the effective date of the General Regulation. The prices on these packs were based on costs and have, since the season started early in July, been uniformly close in the industry. Several weeks ago, according to printed and published articles, a tentative ceiling of \$16.00 per case of 48/1½s Fancy White Meat Tuna was established by the Office of Price Administration, although we have had no definite confirmation of this ceiling from Washington.

A different situation has existed continuously on Light Meat Tuna prices. There has been a variation of more than \$1.00 per dozen between canners above the prices shown on our list, and experience has proven that our prices have been the lowest quoted.

Frankly, we believe such discrepancies are unfair to us. We have gone on record with the O.P.A. in

Washington to the effect that the lowest ceilings should be increased and the highest ceilings decreased. We think the top ceiling should not be more than \$3.25 per dozen on halves Fancy and \$3.00 on halves Standard Light Meat Tuna. In fact we would not consider it unfair if ceilings were established on a basis 25c per dozen less.

We have recently supplied the office of Mr. Chas. W. Triggs in Washington with cost figures on our packs as well as selling prices on a month to month basis from January, 1941 to April, 1942, and we understand that all other canners have done likewise.

The Washington office is definitely trying to establish a dollar-and-cents ceiling on all Tuna and we assure you that no one desires prompt action in the matter any more than we do. We trust that this letter will cover your desires, and we will certainly appreciate any action you may take to expedite results.

Yours very truly,

French Sardine Company, Inc.

By A. T. Williams

ATW:aa—copy - mp

French Sardine Co., Inc., Maximum Prices
Canned Tuna

Prices per dozen cans	48/1½s	48/1s
Fancy Solid Pack White Meat Tuna	\$4.00	\$7.75
Fancy Solid Pack Light Meat Tuna	2.75	5.25
Standard Light Meat Tuna	2.50	4.75

new ceilings, we are beginning to feel the pinch financially. Therefore, we are today issuing instructions to all of our brokers who have received shipments, authorizing them to distribute and invoice the tuna on the basis of \$12.00 per case of 48/1½s Fancy, \$11.00 per case of 48/1½s Standard and \$10.00 per case of 48/1½s Grated Tuna.

On each invoice thus rendered we are noting a guarantee that if the OPA fails to promulgate an order stabilizing or equalizing prices on tuna before October 31st, we agree to revert back to our March ceilings, \$1.00 per case less basis 48/1½s and will refund each buyer accordingly.

We feel that we have been in a bad position ever since the General Maximum Price Regulation of April 28th. Since that time we have packed and shipped about 200,000 cases of tuna, all at the lowest ceilings in the industry. To give you some idea of the situation, Sun Harbor Packing Company and Westgate Sea Products Company have both packed more tuna than we have and they have sold at prices from \$2.00 to \$4.00 per case higher than ours, which means that they have profited by more than a half million dollars in excess of ourselves. Other smaller canners have profited in proportion.

In a conversation with our mutual friend, Roy Harper, of the Van Camp Sea Food Company, the other day, Roy informed us that new ceilings would shortly be announced which would be so low we would be shocked. Therefore, we would like to give you our viewpoint of Van Camp's position.

It is true that their ceiling on Fancy tuna is

\$11.00 per case. It is also true that their ceiling on Standard tuna is \$9.50 per case. But they also have a ceiling on Grated tuna at \$10.35 per case and they have specialized on Grated tuna, packing and selling no standard and only a very small percentage of Fancy. A fine profit may be made on Grated tuna at \$10.35 per case even using whole tuna in the grating process as well as the broken pieces from other packs, because Grated has a lower net content in the can than either Fancy or Standard with a greater yield per ton of fish and labor costs are much lower. Furthermore we understand that consideration is being given the matter of a preferred ceiling price for advertised packs, and, in all fairness, we believe such consideration is entirely correct. This would work to the advantage of Van Camp.

In addition to this, Van Camp has (through their own commendable efforts) established a profitable business on products from tuna livers and oils, which has grown to an extent which might even cause them to lose interest in possible profits on canned tuna. A very low ceiling on canned tuna might not discommode Van Camp but might be harmful to other canners who did not have the foresight to develop a business on the livers and oils from tuna.

We think, perhaps, for one reason or other, which might be disadvantageous to individual canners, all of us may be giving information which has proved to be at cross purposes in obtaining a uniform ceiling. We, too, are perhaps selfish in some

of our views although we try to avoid that angle as much as possible.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp

PLAINTIFF'S EXHIBIT No. 6

[Letterhead of French Sardine Company]

Via Air Mail

November 6, 1942

Mr. Charles W. Triggs

Head, Fish Section

Office of Price Administration

Washington, D. C.

Dear Mr. Triggs:

We note inquiry in your letter of October 30th regarding price of raw tuna about which we referred in our letter of October 26th. We smoked this out at the meeting of the California Fish Cannery Association last week. Here is the dope:

It goes back to the time early in the season when Crivello and Simon caused the price of tuna to jump from \$160.00 to \$190.00 per ton. Shortly after this Crivello started paying a bonus of \$10.00 per ton. Then on August 25th, Crivello came into the open and started showing a price of \$200.00 per ton on his fish tickets. Shortly afterwards Crivello again tried to entice some Van Camp boats over to him by offering the owners a bonus of \$10.00 a ton and Van Camp held his boats by meeting the offer. Therefore while the price of fish is not now \$210.00

per ton, as the fishermen on the boats do not participate in the bonus, actually it amounts to the same thing as all canners in San Diego were obliged to meet this proposition, and all tuna brought in by the large high sea boats since August 25th will be paid for at \$200.00 for Yellowfin, \$190.00 for Bluefin and \$180.00 for Striped Tuna, plus a bonus of \$10.00 per ton on each species to the boat owners.

Now we wrote to you on September 24th that we were invoicing tuna, which we shipped several weeks ahead of that date without invoicing, at a price of \$12.00 per case of 48/1½s Fancy, \$11.00 per case of 48/1½s Standard and \$10.00 per case of 48/1½s Grated. We agreed to refund buyers \$1.00 per case if OPA failed to announce definite dollars-and-cents ceilings which would equalize and stabilize the tuna situation. Recently we have continued to ship and invoice on the same basis without the refund agreement although, if we start making refunds we expect to treat all buyers alike as that is our general policy.

Since October 1st we have packed no tuna in our plant at Terminal Island as we cannot get help enough to operate at capacity on Sardines, which we are supplying mostly to the Government. We have AMA contracts now for Pilchards in the amount of more than 300,000 cases, half of which are already shipped, and we are offering today another 85,000 cases.

We could ship tuna from the plant which we control in San Diego, The High Seas Tuna Packing

Company, at their ceilings which are \$15.00 for Fancy, \$13.50 for Standard and \$12.50 for Grated. However, we prefer to distribute our own brands to our own markets at the lower price in an effort to service customers who have been loyal to us for years.

It is impossible for us to hold large quantities of tuna awaiting action by the OPA on account of the immense amount of money involved. We must continue operating as the only alternative would mean complete liquidation. Therefore we trust that we are not putting our necks in a sling by taking the action noted herein.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp

PLAINTIFF'S EXHIBIT No. 7

[Letterhead of French Sardine Company]

Via Air Mail

November 16, 1942

Mr. Charles W. Triggs
Head, Fish Section,
Office of Price Administration
Washington, D. C.

Dear Mr. Triggs:

We are enclosing herewith original letter, dated November 13th, which we received today from the

State Enforcement Attorney of the Los Angeles office of OPA. We are also enclosing copy of our letter of September 2nd, to which they refer, together with copy of our reply to their latest letter.

There are many misstatements in their letter to us. The second paragraph of their letter is substantially correct, except that we made no mention of the manner in which we arrived at our Tonno ceiling in our letter of September 2nd. That information was given verbally and you are already familiar with it.

In the third and fourth paragraphs of their letter, they state that we shopped our competitor, Van Camp Sea Food Company. At no time did we ever make such a statement. We explained in our letter of September 2nd how we arrived at our price of \$16.00 per case of 48/1½s Fancy White Meat Tuna and this matter was discussed at a Los Angeles conference, where, according to our understanding, this price was considered an acceptable ceiling.

Nothing was said about a price of \$31.00 on 48/1s Fancy White Meat or any price on Grated White Meat. We arrived at our price on these items by following the custom of the industry prior to any government action in the matter, and felt that we were correct in this, based particularly on the fact that when you granted relief to the South Pacific Canning Company on Tuna, you gave them a ceiling on 48/1½s only without specifying sizes or grades.

We know that you are familiar with action we have recently taken on Light Meat Tuna, as we have written to you several times about it. However, their statement that we are selling Eatwell Standard Tuna at 65 cents over the ceiling of Van Camp is incorrect. The fact is that Van Camp's price, to which they refer is for Grated Tuna and our latest price on this item is \$10.00 per case of 48/1½s, which is 35 cents under Van Camp.

The whole thing boils down to a point which we have tried to make on many occasions, that when impractical and theoretical attorneys, doing what they, no doubt, feel is their duty, start enforcement proceedings against citizens who are doing their best to comply with existing laws, they simply cause more serious and real injustices than do the laws themselves.

We have been hoping, of course, that some announcement would be forthcoming from your office, which would alleviate our position, but, in lieu thereof, we would appreciate your advice in our present difficulty, obliging

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:mp—Encls.

PLAINTIFF'S EXHIBIT No. 8

French Sardine Company

Office of Price Administration Nov. 16, 1942
1037 South Broadway
Los Angeles, California

Attention: H. Eugene Breitenbach

Gentlemen:

We refer to your letter of November 13, 1942,
File 8 LA:GS(L).

Before giving you a definite answer, we are sending your letter to Mr. Charles W. Triggs, Head, Fish Section, Office of Price Administration, Washington, D. C., along with a copy of our letter to Mr. Kearns, September 2nd, to which you refer. Our reason for doing this, is that we are still very much confused in the matter of jurisdiction between the Los Angeles and Washington offices.

As far back as April, 1942, we have been striving to arrive at a stabilized or equalized ceiling on all tuna packs. At first we dealt exclusively through Mr. Edward Maher of the Regional Office in San Francisco. We were then given to understand that we should deal with Washington direct. We have been in contact with Mr. Triggs in Washington innumerable times by telephone and telegraph and have made three trips to Washington to discuss ceilings.

At the same time we have tried to cooperate with the Los Angeles office whenever we were requested

to do so. We took occasion during a recent conference in Los Angeles to express our views about enforcement agencies taking over before ordinary laymen like ourselves could possibly obtain a fair decision in connection with the legally framed General Maximum Price Regulation order of April 28th. We base this statement on a speech made by Secretary Wickard at a meeting which we attended in Washington, May 8th, in which he said: "We know that there are many errors in the General Maximum Price Regulation. We know there are many inequalities. We know that the order was hastily prepared and that many canners will be discriminated against and that many will be treated unfairly. Therefore we must concern ourselves and continue working to the end that these inequalities be eliminated. We want production and we do not want anything in this regulation to retard production."

The above speech was made in the presence of about one hundred representative canners from all over the United States as well as both officials and attorneys of the OPA and the Department of Agriculture. We contend that nothing definite has been done to relieve the tuna situation.

All of this, in your opinion, may be beside the point. Therefore, while we are awaiting a reply from Washington to our letter today, we would appreciate receiving your advice as to whether the information you request from us applies to Los Angeles County, Southern California, the State of California and/or the entire United States. Please

be sure of our desire to cooperate with you to the fullest possible extent.

Yours very truly,

French Sardine Company, Inc.

By A. T. Williams

ATW:mp—cc. Chas. W. Triggs, Washington, D. C.

PLAINTIFF'S EXHIBIT No. 9

[Letterhead of French Sardine Company]

Mr. Chas. W. Triggs,

Dec. 5, 1942

Dear Mr. Triggs:

Believe you will find attached letters self explanatory.

Yours very truly,

French Sardine Co., Inc.

/s/ A. T. Williams

PLAINTIFF'S EXHIBIT No. 10

French Sardine Company

Office of Price Administration

Dec. 5, 1942

1037 South Broadway

Los Angeles, California

Attention: Mr. H. Eugene Brietenbach, Senior
Enforcement Attorney

Gentlemen:

We refer to your letter of December 3, File 8
LA:GS(L).

May we state at the outset that we have no in-

tention of dodging the issue in your previous letter of November 13. While there are many errors in the allegations which you make, we will not discuss them here, but rather try to cover the general charges involved.

We admit that we increased the price on our different packs of Tuna late in September. We did so on following premise:

On July 14 and 15, we visited the Washington office of the OPA. We were told then that we might soon expect a stabilized and equalized ceiling on Canned Tuna in a short time. We therefore withheld shipment of any Tuna until the last week in August, accumulating in the meantime more than 50,000 cases with a value over a half million dollars.

We talked with your Washington office by telephone once or twice a week during this period. Finally, the last week in August, we asked the point blank question: "Would we be taking any chance if we shipped our Tuna without invoicing any of it, with the understanding that a new ceiling would be announced by OPA by the time shipments arrived at destination?" We were informed that we would not be taking any chances, as, undoubtedly, a new ceiling would be promulgated before the Tuna could arrive.

Unfortunately, no announcement was made, so we notified our brokers to distribute the Tuna on arrival, to responsible buyers, awaiting later invoicing, and guaranteeing that the price would not

exceed \$1.00 per case basis 48/1½s more than our March ceilings. We waited until September 24 for some action. We then wrote an airmail letter to Washington, advising them that we were going to invoice the Tuna at a price \$1.00 per case above our March ceilings, but making an agreement with the buyers that we would refund \$1.00 per case, to bring our prices on a level with March ceilings if we failed to obtain a new ceiling by October 31.

We failed to receive any approval of our action and therefore made another trip to Washington in order to learn if we had "stuck our necks out." We held a conference with OPA officials, including at least one of their attorneys, and were told that they could not officially approve our action. We were further told that we certainly were entitled to the higher price and, therefore, we could use our own judgment inasmuch as we were not given an official disapproval of the action.

In the meantime an order, effective October 15, was issued by OPA, which granted relief to Wholesalers and Retailers on a percentage based on costs. This placed us in a most embarrassing position for the reason that, if the buyers took advantage of our agreed refund in establishing ceilings during the month of November, it would mean that they might in future be unable to handle Tuna as they would be unable to get supplies at the low price. Furthermore, we would be obliged to develop new markets as our regular markets would be frozen at lower levels than we could possibly meet.

Our offer to refund all buyers to the basis of our March ceilings still stands, but the buyers are reluctant to accept any refunds as they, too, know we are entitled to the new prices, which are still lower than any competition, not even excepting the Van Camp Sea Food Company, to which firm you refer in your November 13 letter.

Now we are forwarding a copy of this letter to Mr. Chas. W. Triggs, Head of the Fish Section, OPA in Washington, together with a copy of your letter to us. He has failed to answer our previous communications about the same matter, but, no doubt, he is so busy with more important items that he just cannot get around to a small commodity like Tuna. We are confident that he will advise both your office and ourselves regarding the difficulty.

Please be sure that we desire to avoid any conflict between the Los Angeles and Washington offices of the OPA. We assure you of our wish to do what is right and will be guided by instructions which we receive.

Yours very truly,

French Sardine Company, Inc.
By A. T. Williams

ATW:mp—cc. Mr. Chas. W. Triggs, Head, Fish
Section, Office of Price Administration, Wash-
ington, D. C.

PLAINTIFF'S EXHIBIT No. 11

[Letterhead of French Sardine Company]

Mr. Charles W. Triggs

April 29, 1943

Head, Fish Section

Office of Price Administration

Washington, D. C.

Dear Mr. Triggs:

On April 28, just a year and a day since the issuance of the General Maximum Price Regulations, we were favored with a visit from two really tough attorneys, Messrs. Brinn and Breen, from the enforcement agency of the O.P.A. in Los Angeles.

They instructed us to compile within ten days a list of each and every invoice issued by us covering any and all Tuna which was priced differently than our purported March ceilings. They proceeded to tell us that we were extreme violators of the regulations and subject to fines for treble damages.

We will not attempt to discuss details as we know you are very busy and are also quite familiar with action which we took. Suffice it to say that it will require the services of four people for a week or more to examine and list several thousand invoices. It will involve close to 150,000 cases of Tuna, which, based on treble damages, would mean a fine of close to a half million dollars.

The Los Angeles office seems to be quite concerned over the fact that we contacted you, in the Washington office, instead of themselves regarding

our troubles. They told us that this was a sad mistake on our part. Whether this has anything to do with their present enforcement activities we do not know, but the fact remains that they, evidently, mean to knock us over after they learn the full extent of our so-called misdeeds.

Any advice you might give us which would be helpful and any action you might take to alleviate the situation would be sincerely appreciated. Please let us hear from you.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:aa

PLAINTIFF'S EXHIBIT No. 12

Mr. A. T. Williams

May 6, 1943

French Sardine Company

Terminal Island, California

Dear Mr. Williams:

This will acknowledge receipt of your letter of April 29 regarding a visit you had from two of the attorneys from the Enforcement Division of the Los Angeles Office of Price Administration. I note that they requested copies of your invoices and other information about the prices you have charged.

We have not heard from the Los Angeles office regarding this, but no doubt we will be fully ad-

vised. We will be very interested in the outcome of your conference.

Very truly yours,

Chas. W. Triggs, Head, Fish
Section, Food Price Division

CWTriggs:ew

PLAINTIFF'S EXHIBIT No. 13

[Letterhead of French Sardine Company]

Mr. Charles W. Triggs
Head, Fish Section
Office of Price Administration
Washington, D. C.

May 6, 1943

Dear Mr. Triggs:

Well, we had our day in court with Mr. H. Eugene Breitenbach, Senior Enforcement Attorney, at the Los Angeles office of O.P.A. We put every card we had on the table and received an answer which represented just about what we expected. We were told that we had violated the General Maximum Price Regulations although it was admitted that we did not violate the intent or purpose of the act.

Then we were told that, in view of the extenuating circumstances, the enforcement agency would be lenient to the extent that they would consider the matter closed if we would present them with a check in favor of the Treasurer of the United States for the exact amount, not treble damages, of

what they considered the excess charges, as a contribution to the war effort.

We are still checking our invoices and find that the total involved will be between \$97,000.00 and \$100,000.00, representing \$1.00 per case, basis 48/1½s Tuna. This is not as much as we first estimated because we did not have to report on White Meat Tuna (Albacore), Bonita, Yellowtail or Tonno, on which no violations occurred. We still feel that we are not being treated fairly or justly by reason of the fact that we were the lowest sellers throughout the year 1942. We were told that, inasmuch as the matter is in the hands of the enforcement agency, we have no other recourse but to comply with their offer of settlement.

Now, we would like to refer to another matter which is, evidently, going to cause a lot of friction and dissatisfaction. We refer to the matter of your ruling about War Risk Insurance being included in the \$200.00 ceiling on Tuna. Frankly, Mr. Triggs, we believe you are wrong. We must doubt if you have given the situation sufficient consideration.

We attended a meeting yesterday afternoon regarding War Risk Insurance. This meeting was attended by Wade Ambrose, of Westgate; Gilbert Van Camp and Montgomery Phister, of Van Camp; Racey Biven, of Coast; Martin Bogdanovich and the writer, of French Sardine; Landers and Wallace, of San Diego Tuna Boat Association; McCaffery and another gentleman from Lower California Fisheries Association. All agreed that War Risk Insurance was not discussed at your meeting

in Los Angeles, March 26. All expressed their understanding that War Risk Insurance was to be handled by the canners as an overhead item removed entirely from the cost of fish, in accordance with precedent set since the start of the war.

Mr. Biven recited an instance of what might often happen if fishermen were required to pay their own insurance. One boat went on a trip which kept them out ninety days and they returned with eight tons of fish. With $11\frac{1}{2}$ percent premium for each thirty days based on the value of the boat plus \$5,000.00 on the life of each fisherman, you may readily understand that his revenue from fish sold would be far from sufficient to pay his insurance, let alone his other expenses.

The next day another boat came in from a nineteen day trip, bringing 200 tons. Incidents such as related here occur very frequently, and, naturally, the net income of all fishermen would vary considerably throughout. On the other hand, if canners paid the insurance, while there might well be a variation in costs between them, it did and will continue to average down to a fairly low level. This, of course, depends on average conditions prevailing. If something dire happened the rate of War Risk Insurance could change violently over night. The rate might become prohibitive, in which case fishing operations would cease. Any advance in rates would only make the situation more acute for the fishermen, although the canners could stand it up to a certain limit.

At the meeting yesterday, the fishermen's repre-

sentatives told us that many individual fishermen were accusing the canners of making frequent trips to Washington and prevailing on yourself to make rulings which are opposed to their interests and simply giving them the squeeze. Of course, this was correctly denied, but to appease them it was decided to apply for relief to the Los Angeles and San Diego branch office of O.P.A.

In passing, we might add that the attorneys who recently visited our own office told us definitely that we made a mistake in going to Washington with our troubles as the Los Angeles office could give us all the answers in a better manner much sooner. They told Van Camp the same thing and are probably passing the word along down the line.

In conclusion, we will give you our ideas on the roll back of Tuna prices. We believe that under present conditions, with no unforeseen developments which might cause costs to increase abnormally, you would not cause a hardship on the industry if you set new ceilings on White Meat Tuna from \$1.00 to \$1.50 per case of 48/1½s below present levels, and a reduction on Light Meat Tuna, not including Bonita or Yellowtail, of fifty cents per case basis 48/1½s. This could be explained by the lowering of the cost of Albacore in the amount of \$75.00 per ton or more, and the elimination of bonus payments for Light Meat Tuna.

Our idea of a correct ceiling for fresh market fish, including particularly Albacore, which is mostly used for canning, would be on a basis of five cents per pound higher than the canner levels. This

would make Yellowfin \$300.00 per ton or 15 cents per pound, and would prevent certain canners we might mention from entering the fresh fish business in order to obtain additional supplies for canning, and also prevent any canner from purchasing fish from fresh fish markets. We refer to those fellows who fail to follow the general practice of investing in, or financing boats for themselves.

We would greatly appreciate any suggestions you might give us in connection with the Breitenbach ruling either by collect wire or air mail. The attorneys are coming to our office Monday, May 10, to obtain our list of invoices.

Thanks for your attention. We hope we have not bored you.

Yours very truly,

French Sardine Company, Inc.

/s/ By A. T. Williams

ATW:aa

PLAINTIFF'S EXHIBIT No. 14

Mr. A. T. Williams

May 19, 1943

French Sardine Company

Terminal Island, California

Dear Mr. Williams:

This will acknowledge receipt of your letter of May 6. I note your remark concerning your meeting with the enforcement attorneys at Los Angeles and the decision that was made. We have heard

nothing as yet from the Los Angeles Office about this matter.

On May 15 I wired you regarding our decision on the payment of war risk insurance.

We are giving careful consideration to the question of the sale of fresh tuna to wholesale dealers, and we may be able to provide for this in our new fresh fish regulation.

Very truly yours,

Chas. W. Triggs, Head, Fish
Section, Food Price Division

CWTriggs:dg—5/19/43

PLAINTIFF'S EXHIBIT No. 15

Mr. A. T. Williams
French Sardine Company
Terminal Island, California

July 7, 1943

Dear Mr. Williams:

I received your letter of June 17 and carefully noted your remarks regarding the press release covering the payment you made to the Office of Price Administration for over-charge on tuna and the payments made by other companies.

I fully realize the position your company was placed in by having lower ceilings than your competitors. The March ceilings were far from being equitable. Now that we have established uniform ceilings on practically all varieties of fish, this cannot happen again.

I trust you will have a very successful season in 1943.

Kindest regards.

Very truly yours,

Chas. W. Triggs, Head, Fish Section,
Food Price Division

CWTriggs:ew

PLAINTIFF'S EXHIBIT No. 26

In the District Court of the United States, Southern District of California, Central Division

No. 2960-BH

Prentiss M. Brown, Administrator, Office of Price Administration, Plaintiff, vs. French Sardine Company, Inc., a corporation, Defendant.

COMPLAINT

1. In the judgment of the Price Administrator the defendant has engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942 as amended (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) hereinafter called "the Act" in that defendant, as more particularly hereinafter alleged, has violated General Maximum Price Regulation as amended, effective in accordance with the provisions of said Act, and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance with said Regulation.

2. Jurisdiction of this cause of action is conferred upon this Court by Section 205(c) of the Act.

3. At all times herein mentioned there has been in effect, pursuant to said Act, General Maximum Price Regulation as amended, establishing a maximum price for canned tuna fish and other sea foods, and that the maximum price thereof, established by said General Maximum Price Regulation as amended, is the highest price for which said commodities were sold during the month of March 1942 by defendant, or if said commodities were not sold during the month of March 1942 by defendant, the maximum price thereof established by said General Maximum Price Regulation as amended is the highest price for which such commodities were sold during the month of March 1942 by defendant's most closely competitive seller.

4. Defendant, a packer and canner of canned tuna fish and other sea foods, at all times herein mentioned doing business at Terminal Island, County of Los Angeles, State of California, sold no canned tuna fish during the month of March 1942, but since and including May 11, 1942, the effective date of General Maximum Price Regulation as amended, at wholesale, defendant sold and delivered at wholesale canned tuna fish at prices higher than the maximum price for which defendant's most closely competitive seller sold said commodity, as determined by said General Maximum Price Regulation as amended, during the month of March 1942.

Wherefore plaintiff prays for relief as follows:

1. For a preliminary and final injunction, enjoining the defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant, from directly or indirectly selling or delivering canned tuna fish and other sea foods at prices in excess of the maximum prices established by said General Maximum Price Regulation as amended, or attempting or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Emergency Price Control Act of 1942 as amended, establishing a maximum price for canned tuna fish and other sea foods.

2. For such other and further relief as the Court may deem just and proper.

[Seal] /s/ Frank S. Balthis, Jr.,
 Chief Attorney
 /s/ John J. Ford,
 Chief Enforcement Attorney
 /s/ H. Eugene Breitenbach,
 Chief Litigation Attorney

[Endorsed]: Filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 27

[Title of District Court and Cause No. 2960.]

STIPULATION

It Is Hereby Stipulated by and between plaintiff, Administrator of the Office of Price Administration, by counsel, and the defendant French Sardine

Company, Inc., a California corporation, by it and by its counsel, that:

1. The defendant waives service of process, answer and any and all defenses that it may have to the claim set forth in the complaint herein, hearing, findings of fact and conclusions of law; and

2. A final judgment, in the form hereto annexed, may be entered against the defendant without notice at any time hereafter.

Signed at Los Angeles, California, this 1st day of June, 1943.

French Sardine Company, Inc.,
a corporation

[Seal] /s/ By M. J. Bogdanovich, President

/s/ By [Illegible], Secretary

/s/ John V. Morris, Attorney for
Defendant

/s/ H. Eugene Breitenbach, one of the
attorneys for Plaintiff

[Endorsed]: Filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 28

[Title of District Court and Cause No. 2960.]

JUDGMENT

Plaintiff having filed his complaint, and the defendant having appeared by counsel, and having waived service of process, answer, and all defenses to the claim set forth in the complaint which it might have, hearing and findings of fact and con-

elusions of law, in accordance with a stipulation between the parties hereto, entered into on the 1st day of June, 1943, and filed in the office of the Clerk of this Court, and defendant having agreed in said stipulation to the entry of the final judgment in the form set forth below, and sufficient reasons appearing therefor;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the defendant, its officers, agents, servants, employees, attorneys and all persons in active concert or participation with the defendant, be and they are hereby permanently enjoined from directly or indirectly selling or delivering canned tuna fish and other sea foods at prices in excess of the maximum prices established by said General Maximum Price Regulation as amended, or otherwise violating said General Maximum Price Regulation, or attempting or agreeing to do anything in violation thereof, or in violation of any regulation or order issued pursuant to the Emergency Price Control Act of 1942 as amended, establishing a maximum price for canned tuna fish and other sea foods.

It Is Further Ordered, Adjudged and Decreed that jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this decree, for the modification thereof, and enforcement or compliance therewith, and for the punishment of violations thereunder.

Dated at Los Angeles, California, this 3rd day of June, 1943.

/s/ Paul J. McCormick,
United States District Judge

Consent to the entry of the foregoing decree is hereby given.

/s/ Frank S. Balthis, Jr., Chief Attorney

/s/ John J. Ford, Chief Enforcement Attorney

/s/ H. Eugene Breitenbach, Chief Litigation Attorney

Consent to the entry of the foregoing decree is hereby given.

French Sardine Company, Inc., a corporation

/s/ By M. J. Boganovich, President

/s/ By [Illegible], Secretary (Seal)
Defendant

/s/ John V. Morris, Attorney for Defendant

[Endorsed]: Judgment entered and filed June 3, 1943.

PLAINTIFF'S EXHIBIT No. 32

[Invoice Heading of Franch Sardine Company]

Invoice T No. 41129; Date: Sept. 26, 1942; Shipping Order No. 34224; Sales Memo No. 6260; Terms: 11½%-(\$1796 10 days due 10/6/42); F.O.B. Terminal Island.

Sold To: D. F. De Bernardi & Co., 201 Broadway, San Francisco, Calif.

Shipped to: Same.

How Shipped: Via Snowden Transportation Co.— Freight Prepaid.

Broker: F. A. Davis Co., San Francisco, Calif.

100 CS 48/½ Belle Isle Sld Pk

Yellowfin Tuna	1200	1200.00
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Less Swell Allowance ¼%		3.00
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1197.00

Plus Freight 2850 lbs - 28 Cwt.		7.98
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1204.98

Stop Charge		1.06
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1206.04

Please remit in accordance with this Invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/½s and \$2.00 per case less on 48/1s, and will refund you accordingly.

French Sardine Company, Inc.

Shipping Instructions

Date: Sept. 23, 1942

No. 34224

Ship to D. F. DeBernardi & Co., 201 Broadway,
San Francisco, Calif.

Destination: Same.

Via Snowden Transportation Co. Freight Prepaid.

Cases	Size	Label	Commodity	Weight
100—48/1 $\frac{1}{2}$ s	Belle Isle	Sld Pk	Yellowfin Tuna	2850 #

French Sardine Co., Inc.

By LH

In full

Accounting Dept. Copy

PLAINTIFF'S EXHIBIT No. 35

[Letterhead of French Sardine Company]

To Our Brokers:

August 20, 1942

Recently, even prior to the opening of the Northern California Sardine Season last week, at least one Northern California Canner made definite offers on Sardines at prices which indicated that he had a high ceiling in March. We understand that bookings are subject to pack, subject to government release and other exceptions which would make contracts meaningless, but which, nevertheless have a tendency to "muddy the waters", and the action has certainly cost us a good many dollars answering wires and letters.

In our opinion, such action is in direct violation of War Production Board Order No. M-86B. How-

ever, we always have to contend with the ideas of certain men who seem to proceed without regard to law or government orders in extreme emergencies or otherwise and defiantly show that they are going to run their own business as they see fit. We, of course, may not judge their motives because circumstances may sometimes be deceiving.

As far as we are concerned, it will be our policy to cooperate with the government and we do not propose to take any steps that might in any way interfere with or confuse the war effort. Please be sure that we will make every endeavor to protect our distribution in the civilian trade and particularly are we anxious to insure the position of our good broker representatives.

We are confident that our government agencies will, when the time is ripe, regulate ceilings which will be fair to all and also, if possible, release some California canned fish for regular trade channels. You may depend on it that we will definitely advise you what we can do just as soon as we are in position to do so.

The above applies mostly to sardines, but the situation is quite similar on Mackerel and Tuna. No Mackerel has been packed in the Los Angeles Harbor district since March. There have been some small packs in San Diego, but the government is taking it as fast as packed and, inasmuch as they have already announced their requirements as 500,000 cases, indications are not favorable for any releases.

The demand for tuna still greatly exceeds the supply of all varieties, including Albacore, and now the Army is requesting bids on upwards of 50,000 cases.

/s/ French Sardine Company, Inc.

ATW:ab

[Letterhead of French Sardine Company]

To Our Brokers:

September 24, 1942

For the benefit of those who failed to see published reports, we are listing below ceiling prices promulgated by the Office of Price Administration order No. 209 under date of August 26th, 1942, effective August 31st—

48/1s Oval Sardines in Tomato or Mustard..	\$4.62
48/1s Oval Sardines Natural	4.52
48/1s Tall Sardines Tomato or Mustard.....	3.95
48/1s Tall Sardines Natural	3.60
96/8 oz. Sardines in Tomato or Mustard....	5.25
96/8 oz. Sardines Natural	5.00
100/5 oz. Sardines in Tomato or Mustard....	4.65
100/5 oz. Sardines Natural	4.40

Note: There will be no 96/8 oz. or 100/5 oz. Sardines for civilian trade. There may be some Ovals and Talls released later, but not until government requirements are filled.

French Sardine Co., Inc.

ATW/co

[Letterhead of French Sardine Company]

To Whom It May Concern:

Sept. 24, 1942

We have shipped several cars of canned fish to certain markets during the past thirty days. We have issued instructions to distribute the merchandise, invoicing the buyers for those items on which there were definite ceiling prices and holding the balance of the billing in abeyance, awaiting an expected new ceiling order from the Office of Price Administration which would relieve the tight situation in which we have been placed by our March ceilings on some items.

We have been advised many times direct from the Washington office of O.P.A. about their intent to equalize the vast differences in prices between canners. We have been repeatedly told that we may expect an increase on the low ceilings and a decrease of the high ceilings.

When on August 26th, the O.P.A. actually took this step on the item of California Sardines, we believed that similar relief would be forthcoming shortly on the other items. However, these government agencies have so many angles and so many people to please or placate that undue delays sometimes arise.

In order to facilitate matters and to improve our financial status we propose the following procedure:—

On receipt of this letter, please arrange to in-

voice all buyers who have received merchandise at the following prices:—

48/1½s	Fancy Solid Pack Tuna.....	\$12.00
48/1s	Fancy Solid Pack Tuna.....	23.00
48/1¼s	Standard Tuna	6.50
48/1½s	Standard Tuna	11.00
48/1s	Standard Tuna	21.00
48/1½s	Grated Tuna	10.00
48/1s	Grated Tuna	19.00
48/1½s	Bonita	10.00
48/1½s	Flaked Yellowtail	10.00

Above prices are F.O.B. Coast, usual terms. Be sure to add freight, which was prepaid. Then make the following notation on each and every copy of invoices covering packs of light meat tuna only:

“Please remit in accordance with this invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are \$1.00 per case less on 48/1½s and \$2.00 per case less on 48/1s, and will refund you accordingly.

French Sardine Company, Inc.”

In conclusion, we may only state that we have been badly disappointed by the long delays. We trust that something may soon be done to clear the tuna situation satisfactorily and that our present action may meet with the approval of all concerned.

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

September 24, 1942

Information Letter

Sardines

September 17th, Roy F. Hendrickson, Administrator of the Agricultural Marketing Administration notified all California canners that government requirements of sardines for the 1942-1943 packing season have been increased from 2,500,000 cases to 3,325,000 cases. He also requested the industry to pack exclusively for government requirements until government needs are filled.

This notification needs little comment. It simply means that there will be no early, if any, releases of sardines for civilian trade. With the fishing fleet reduced approximately fifty percent below last season, we may not reasonably expect to reach the record pack of 5,000,000 cases made during the 1941-42 season. In fact, we must be optimists to anticipate a total pack over 4,000,000 cases.

This should indicate to you our reasons for failing to accept either firm orders or memorandum bookings. Please bear with us in this matter and rely on us to make fair allotments of Sardines when and if they are available.

Mackerel

The government has stated its requirements to March 31, 1943, as 500,000 cases. Practically none has been packed since the season opened July 1st. The shortage of Mackerel fishing boats is even more acute than sardine boats. We have found no one so

foolhardy as to predict a total Mackerel pack sufficient to supply government needs. Therefore, unless some very unexpected change occurs, it appears that Mackerel is out as far as civilian trade is concerned.

This government action may work a severe hardship on some brokers and buyers. However, we must all cooperate with our government agencies in their fine efforts with the War program. We are sure we may depend on your united support to insure the end we are seeking.

ATW:lh

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

To Our Brokers:

October 20, 1942

We are enclosing herewith brokerage check for September sales. Please note that this check does not represent the exact amount of brokerage due. We withheld a small percentage in an effort to avoid confusion which may result if the Office of Price Administration does not give us promised relief on or before October 31st. It may be necessary for us to refund the buyers, who have paid for tuna at the new prices.

Your brokerage will be properly adjusted when we send your checks in November covering October earnings, and a brokerage statement showing any necessary adjustments will accompany our check at that time.

ATW:lh

French Sardine Company, Inc.

[Letterhead of French Sardine Company]

December 1, 1942

Important Notice

Effective December 1, 1942, there will be a three percent Federal Tax added to all freight bills. This tax must be passed on to the buyers and it will, therefore, be necessary to show same on all freight items as a separate entry on all invoices.

French Sardine Company, Inc.

P.S.: Please note that correct weight for billing 48/1s Oval Sardines packed in Solid Fibre cartons is 61 lbs. per case. Kindly watch this.

ATW:lh

[Letterhead of French Sardine Company]

To Our Brokers:

January 4, 1943

During the early morning hours of January 2nd a fire of undetermined origin broke out, causing the complete loss of our new Plant No. 2. Under present conditions, it is extremely doubtful if we may rebuild on account of shortage in building supplies and necessary machinery.

Included in the loss, we were holding for shipment against government contracts approximately 26,000 cases of canned sardines. We do not know at this time, and probably will not know for at least thirty days, whether we will receive any relief from the government in the matter of delivery. We rather believe that the government will expect us

to complete our contracts from packs in our main plant, which we may reasonably hope to make during the balance of the packing season.

This loss is certain to reduce our allotments for civilian trade, which allotments are now only twenty percent of total packs in accordance with amendment to order M-86b, December 24th, 1942, which definitely sets government requirements at eighty percent of packs.

We, therefore, request that you do not press us for deliveries of any canned fish. Please, rather, depend on us to distribute what packs may be available in as fair and equitable a manner as is physically possible for us to do so. We are deliberately giving you the dark side of the situation in the faint hope that a ray of sunshine in the way of heavy packs may develop later so that we may do better than present conditions indicate.

ATW:lh

French Sardine Company, Inc.

[Endorsed]: No. 14794. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Star-Kist Foods, Inc. (formerly The French Sardine Company of California), Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: June 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14794

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC. (formerly The French
Sardine Company of California),

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Pursuant to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby adopts its Statement of Points on Appeal, which was filed in the District Court, as its statement of the points upon which it intends to rely in this Court.

Designation of Record

Pursuant to Rule 17(6) of this Court, appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely on this appeal, and desires to have printed, omitting the title of Court and cause from each of the documents designated for printing:

1. The complete record, certified by the Clerk of the District Court to the Court of Appeals except that there shall be included only the following

of the plaintiff's Exhibits: 1 through 15, 26, 27, 28, 32, and 35.

2. The District Court Clerk's certification of Record on Appeal;

3. Application for Extension of Time to Docket Record on Appeal and Order, filed June 7, 1955;

4. This Designation of Record Necessary for Consideration on Appeal and to be Printed; and

5. Statement of Points Upon Which Appellant Intends to Rely on Appeal. (Court of Appeals)

Dated: This 8th day of July, 1955.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,

Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,

Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTING OF RECORD

It is hereby stipulated between the parties hereto, through their respective counsel of record, that the following documents, which are material to consid-

eration of the appeal, may be excluded from that portion of the record to be printed; but that, notwithstanding such exclusion from the printed record, said documents may be referred to in the briefs and arguments of either party hereto the same as if said documents had been included in the printed record:

1. Plaintiff - Appellee's Exhibits numbered 16 through 25, inclusive, 29, 30, 31, 33, 34 and 36.
2. This stipulation.

Dated: July 12, 1955.

MACKAY, McGREGOR, REYNOLDS
& BENNION,

/s/ By STAFFORD R. GRADY,

Attorneys for Appellee
LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

ROBERT H. WYSHAK,
Asst. U. S. Attorney

/s/ ROBERT H. WYSHAK,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 15, 1955. Paul P. O'Brien,
Clerk.

